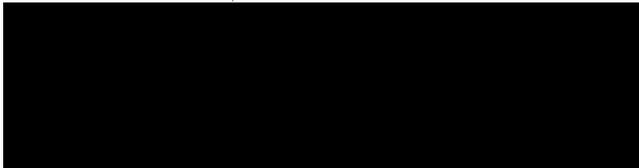


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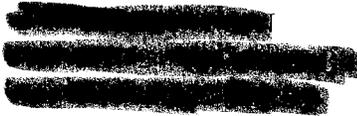
IN RE:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a medical billing systems and software company. It seeks to employ the beneficiary permanently in the United States as a computer operations manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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 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 granting 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 25, 2001. The proffered wage as stated on the Form ETA 750 is \$38.13 per hour, which equals \$79,310.40 per year.

On the petition, the petitioner stated that it was established during 1985 and that it employs 30 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June 1995 as its computer operations manager. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Brooklyn, New York.

In support of the petition, counsel submitted the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports income taxes pursuant to the calendar year, and that during 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,372. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also provided a letter, dated June 10, 2003, from the petitioner's president. That letter states that the petitioner paid large amounts to outside contractors during 2001, the total of which is shown at Line 3 of Schedule A. That line shows "Costs of Labor" of \$281,000. That letter did not demonstrate, nor even allege, that the petitioner paid any portion of that amount to contractors for performing the duties of the proffered position.

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 August 15, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during 2001 and 2002.

In response, counsel submitted (1) a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return, (2) the petitioner's compiled 2001 and 2002 financial statements, (3) 2001 and 2002 Form 1099 Miscellaneous Income statements, and (4) counsel's own letter, dated November 6, 2003.

The 2002 tax return shows that the petitioner declared a loss of \$2,499 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 had current assets of \$14,319 and current liabilities of \$13,413, which yields net current assets of \$906.

The 1099 forms show that the petitioner paid the beneficiary non-wage compensation of \$28,825 and \$26,066 during 2001 and 2002, respectively.¹

Counsel's letter reiterates the assertion that the amount shown on Schedule A, Line 3, Cost of Labor, of the petitioner's tax returns represents payments to outside contractors, and states that the beneficiary was one of those contractors. The 2002 Schedule A shows Cost of Labor of \$277,153. Counsel also emphasizes the amount of the petitioner's Operating Revenues, Gross Operating Profit, Salaries and Wages, and Depreciation Deductions during 2001 and 2002 in stating that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date.

The Acting 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 17, 2004, denied the petition.

On appeal, counsel submits copies of the 2000, 2001, and 2002 Form 1040 U.S. Individual Income Tax Return tax returns of the beneficiary and the beneficiary's spouse. The 2001 and 2002 returns confirm, on corresponding Schedules C, Profit or Loss from Business, that the beneficiary received the amounts shown on

¹ That counsel submitted 1099 forms rather than the requested W-2 forms indicates that during 2001 and 2002 the petitioner paid the beneficiary as a contractor, rather than as an employee.

the 1099 forms previously submitted. The Schedule C, however, states that the primary business of the beneficiary in earning those amounts was "salesman."

In the brief, counsel states that the petitioner's profit during 2001 was sufficient to pay the proffered wage, but that the Acting Director impermissibly subtracted the petitioner's liabilities from that amount. Counsel reiterates the assertion that the amount shown on Schedule A at Line 3 represents funds available to pay the proffered wage. Counsel also stresses the amount of the petitioner's total assets.

Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a petitioner's losses or low profits during a given year are not dispositive of the issue of its ability to pay the proffered wage. Counsel also cites several non-precedent decisions of this office in support of the assertion that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of non-precedent decisions is of no effect.

Matter of Sonegawa, supra, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case, the petitioning entity 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 *Sonegawa*, 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 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the evidence does not demonstrate that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. No evidence demonstrates an extraordinary reason for the petitioner's low profit during 2001 and its loss during 2002. The evidence demonstrates no objective factors that suggest that the petitioner's profits are likely to rise. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel's reliance on the compiled, unaudited financial statements submitted is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its

ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that 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. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it 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*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). 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 its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel's assertion that the petitioner's Operating Revenues, Gross Operating Profit, Salaries, and Wages, demonstrate its ability to pay the proffered wage is also unconvincing. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts or some interim value exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income,³ 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 it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

On a Form 1120 U.S. Corporation Income Tax Return, the figure that corresponds most closely to net income is the taxable income before net operating loss deduction and special deductions. 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 CIS should have considered income before expenses were paid rather than net income.

² The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

³ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

The petitioner asserts that the Cost of Labor shown on Line 3, Schedule A of its 2001 and 2002 tax returns are funds available to pay the proffered wage. The evidence does not demonstrate, however, what portion, if any, of those amounts were paid to contractors for performing the duties of the proffered position. If those payments were for the performance of other essential duties, then they were not available to pay the proffered wage. The petitioner has not demonstrated that any portion of those funds was available to pay the proffered wage and they will not be further considered.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 ordinarily be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it paid the beneficiary \$28,825 and \$26,066 during 2001 and 2002, respectively.

The beneficiary's personal income tax returns, however, indicate that the beneficiary was paid for acting as a salesman for the petitioner. If the petitioner had hired the beneficiary to perform the duties of the proffered position during those same years, those amounts would not have been available to pay the wages of the proffered position, as the petitioner would presumably have required a salesperson to replace the beneficiary. No part of the amounts the petitioner paid to the beneficiary during 2001 and 2002 will be included in the determination of the petitioner's ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, 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 to assess 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).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

Contrary to counsel's assertion, however, the petitioner's total assets do not represent a fund available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$79,310.40 per year. The priority date is April 25, 2001.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,372. That amount is insufficient to pay the proffered wage. The petitioner ended the year

with negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not demonstrated the existence of any other funds during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year, the petitioner had net current assets of net current assets of \$906. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during that year with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.