



U.S. Citizenship
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BY

FILE:

[REDACTED]
EAC 03 123 51194

Office: VERMONT SERVICE CENTER

Date: AUG 19 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:

SELF-REPRESENTED

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 petition¹ was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an import/export distributor of fashion accessories. It seeks to employ the beneficiary permanently in the United States as a market research analyst. 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. The director denied the petition accordingly.

On appeal, the petitioner 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.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$33.35 per hour (\$69,368.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, petitioner submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

¹ The former counsel in this matter is no longer a member of the California bar, and, therefore, the decision will be sent to the petitioner only.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary had the requisite two years work experience, the Vermont Service Center on June 19, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

“Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$29,368.00 [sic \$69,368.00] as of April 30, 2001, the date of filing and continuing to the present.

Submit the 2002 United States federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax return. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted or resubmitted the petitioner's Internal Revenue Service (IRS) Form 1120 tax returns for years 2001 and 2002.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$69,368.00 per year from the priority date, April 30, 2001.

- In 2001, the Form 1120 stated taxable income loss of <\$26,055.00>.²
- In 2002, the Form 1120 stated taxable income of \$2,272.00.

The director denied the petition on November 19, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, petitioner asserts in pertinent part:

“We submit that the Service erred in denying the Immigrant Petition, which decision is based not on application of the law and on controlling precedent, but solely on opinion.”

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Evidence was submitted to show that the petitioner employed the beneficiary and paid wages of \$40,000.00 in 2001 and in 2002.

² The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

Alternatively, in determining the petitioner's ability to pay the 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. Adding the wages paid in 2001 and 2002 with the reported taxable income and loss for those years does not equal the proffered wage.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to sufficient pay the proffered wage at any time between the years 2001 through 2002 for which petitioner's tax returns are offered for evidence.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the two Form 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates the following:

- In 2002, petitioner's Form 1120 return stated current assets of \$33,551.00 and \$102,485.00 in current liabilities. Therefore, the petitioner had <\$68,934.00> in net current assets for 2002. Since the proffered wage was \$69,368.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of \$33,457.00 and \$108,217.00 in current liabilities. Therefore, the petitioner had a <\$74,760.00> in net current assets for 2001. Since the proffered wage was \$69,368.00 per year, this sum is less than the proffered wage.

³ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the period 2001 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Petitioner desires to demonstrate that it pays the beneficiary more compensation that is reflected in the W-2 statements submitted as petitioner also pays the beneficiary's health insurance premiums that amounts to \$10,253.64 on an annual basis. Since the sum of the wages paid and benefits paid for the year is less than the proffered wage, petitioner's assertion is not probative of the ability to pay the proffered wage.

Petitioner also offers its debit card account and bank account to assert that the cash reflected in these monthly statements are proof that it has the ability to pay the proffered wage. Petitioner's reliance on the balances in the petitioner's accounts is misplaced. First, 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 otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Petitioner asserts that the loss of beneficiary's services will result in hardship to petitioner. Petitioner's assertion is not persuasive. Proof of ability to pay begins on the priority date, that is April 30, 2001, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a market research analyst will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. The beneficiary was already providing services for the petitioner. The record does not contain evidence of the beneficiary's contribution to petitioner's taxable income for tax years 2001 through 2002, or explain how his permanent employment will turn losses into profits for the company. If anything, beneficiary's higher wage will result in increased payroll expenses. Petitioner argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Petitioner asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date "beyond the tax returns." Petitioner contends that as a relatively new company, to establish its competitive position, it "...practices the advance delivery of their services if payment be given in the future ..." and therefore, practices the accrual method for accounting for profits and losses.⁴ Petitioner provides a picture of the present financial status of its business as well as its business plan to also contend that the totality of circumstances it finds itself in, shows that it is a viable business with near term losses but with the potential to achieve financial stability and profits. Petitioner's contention that this accounting practice demonstrates its ability to pay the proffered wage is unpersuasive.

⁴ The accrual method of accounting is a common accounting method used by businesses.

According to regulation,⁵ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Petitioner cites *Matter of Sonegawa* for the above proposition. *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. 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. There were large moving costs and also a period of time when the petitioner was unable to do regular business. 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the tax years 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

The Petitioner had not paid the beneficiary the proffered wage for the period under examination 2001 through 2002. Therefore, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage during that period. The beneficiary's wages are payroll expenses in those returns. There are not parallels in the subject case to that precedent case. After a period of low profits the petitioner has not experienced an increase in taxable income by the evidence submitted. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years, as is the case here. Petitioner, although submitting complete tax and payroll records, has not established a case for application of *Matter of Sonegawa*. The petitioner is not a viable business that by paying the beneficiary his present wage has proved its ability to pay the proffered wage.

Petitioner's analysis cannot be concluded to outweigh the evidence presented in the two corporate tax returns as submitted by petitioner that by any test demonstrates that petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner 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.

⁵ 8 C.F.R. § 204.5(g)(2), *Supra*.