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U.S. Department of Homeland Security
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U.S. Citizenship
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FILE:



Office: CALIFORNIA SERVICE CENTER

WAC 03 061 55848

Date: AUG 22 2005

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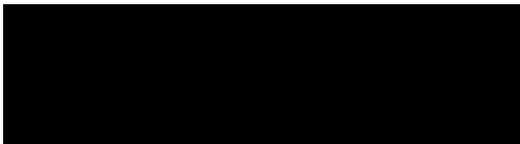
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is an intermediate care facility/developmentally disabled nursing facility. It seeks to employ the beneficiary permanently in the United States as a licensed psychiatric technician ("L.P.T"). 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 counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 regulation 8 C.F.R. § 204.5(l)(3)(ii) states in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(D) *Other Workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 March 16, 2001. The proffered wage as stated on the Form ETA 750 is \$17.28 per hour (\$35,942.40 per year).

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, copies of documentation concerning the beneficiary's qualifications. At the time that the petition was filed the petitioner had a staff of 240 employees.

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 California Service Center on March 26, 2003, April 21, 2003, August 27, 2003 and December 10, 2003, requested evidence pertinent to both those issues.

On March 26, 2003 the Service Center requested in pertinent part.

Beneficiary Currently Working for Petitioner: Evidence submitted with this petition indicates that the petitioner employed the beneficiary. The petitioner is requested to submit copies of Form W-2 issued to the beneficiary. Submit copies for the period from 2001 to the present.

* * *

Ability to Pay: Provide evidence of the petitioner's ability to pay the beneficiary's 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 either in the form of copies of annual reports, audited financial statements, or copies of the original signed federal income tax returns submitted to the Internal Revenue Service. If federal tax returns are used to establish ability to pay the beneficiary's wage, all schedules, attachments, and statements should be included with the return.

The petitioner is requested to provide this evidence from March 16, 2001 to the present. The Service acknowledges that the I-140 petition indicates that the petitioner employs more than 100 workers. Still one of the above listed forms of evidence is requested.

In response to the Requests for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1120 tax returns for year 2001 and 2002, as well as other wage and financial data.

The two tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$35,942.40 per year from the priority date.

- In 2002, the Form 1120 stated taxable income of \$13,394.00.
- In 2001, the Form 1120 stated taxable income loss of <\$285,413.00>¹.

The director denied the petition on May 27, 2004 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

¹The 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.

On appeal, counsel asserts:

Despite the allegations stated by the Service, the complete business tax returns of the petitioner for the past few years show gross profit of more than 6 million dollars, salaries paid in excess of 3.5 million, clearly showing that the petitioner is a viable business entity capable of paying the beneficiary's salary and the position should be approved.

On appeal, the petitioner resubmitted the above tax returns and Form 1120 for 2003 that stated:

- In 2003, the Form 1120 stated taxable income loss ² of <\$66,031.00>.

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. According to petitioner,³ the beneficiary was employed by it at \$14.88 per hour (\$30,950.40/year) from March 8, 2003, and prior to that at \$14.38 per hour at less than full time. The 2002 W-2 Wage and Tax Statement stated wages paid in the amount of \$20,029.47. The 2001 W-2 Wage and Tax Statement stated wages paid of \$19,881.65.⁴ Therefore, petitioner has not paid beneficiary the proffered wage by the evidence submitted.

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. 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.

² IRS Form 1120, Line 28.

³ There is also a letter dated July 3, 2004, in the record of proceedings in which the petitioner states the beneficiary receives \$17.28 per hour from another employer and that "...his wages at the other job equal the amount [of the proffered wage]."

⁴ There also W-2 statements submitted for 1999 and 2000 showing employment before the before the priority date of the alien labor certification. Both years stated wages paid in amounts below the proffered wage.

- In 2003, the Form 1120 stated taxable income loss of <\$66,031.00>. According to petitioner, the beneficiary was employed by it at \$14.88 per hour (\$30,950.40/year) from March 8, 2003. However, there is no information submitted stating total wages paid to beneficiary in 2003.
- In 2002, the Form 1120 stated taxable income of \$13,394.00. The 2002 W-2 Wage and Tax Statement stated wages paid of \$20,029.47. The sum of these two figures is less than the proffered wage of \$35,942.40 per year.
- In 2001, the Form 1120 stated taxable income loss of <\$285,413.00>. The 2001 W-2 Wage and Tax Statement stated wages paid of \$19,881.65. The sum of these two figures is less than the proffered wage of \$35,942.40 per year.

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 2003 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.⁵ 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 that had an attached Schedule L, that schedule found in each of those returns indicates the following.

- In 2003, petitioner's Form 1120 return stated current assets of \$345,676.00 and \$679,085.00 in current liabilities. Therefore, the petitioner had <\$333,409.00> in current net assets for 2003. Since the proffered wage was \$35,942.40 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of \$338,607.00 and \$799,045.00 in current liabilities. Therefore, the petitioner had <\$460,438.00> in current net assets for 2002. Since the proffered wage was \$35,942.40 per year, this sum is less than the proffered wage.

Therefore, for the period 2002 through 2003 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.

Counsel asserts in his brief accompanying the appeal that there "... the complete business tax returns of the petitioner for the past few years show gross profit of more than 6 million dollars, salaries paid in excess of 3.5 million, clearly showing that the petitioner is a viable business entity capable of paying the beneficiary's salary" Counsel cites no legal precedent for this position, and, according to regulation,⁶ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

⁵ 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.

⁶ 8 C.F.R. § 204.5(g)(2), *Supra*.

The response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In certain cases, the "totality of the circumstances" involving a petitioner business' affairs, may in some cases excuse poor interim financial performance. *Matter of Sonogawa*, 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 *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Petitioner had paid the beneficiary close to the proffered wage from March 8, 2003. Before that date, the petitioner had established that it had the ability to pay the beneficiary two-thirds of the proffered wage before that time. As mentioned previously, at the time the petition was filed, the petitioner had 240 workers on payroll. Those wages are payroll expenses in those returns. There are parallels in the subject case to the precedent case *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioner has experienced an increase in approximate gross receipts in the three years examined, \$5.5 Million in 2001, \$6.12 Million in 2002, and, \$6.3 Million in 2003. Along with this increase, the total approximate wages paid to all workers by petitioner rose from \$3.5 Million in 2001, to \$3.6 Million in 2002 and 2003. *Matter of Sonogawa* 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. Counsel, by forthrightly submitting complete tax and payroll records, has established a case for application of *Matter of Sonogawa*. The petitioner is a viable business that by paying its employees their present wages has proved its ability to pay the proffered wage. The large gross receipts, number of workers over 100, and, the payment of salaries equaling approximately one-half the gross receipts, leads to a finding that the business is viable and capable of paying an additional compensation of not more than \$15,000.00 that is the differences in the wages paid in years 2001 and 2002 and the proffered wage.

The evidence submitted does 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 met that burden.

ORDER: The appeal is sustained