

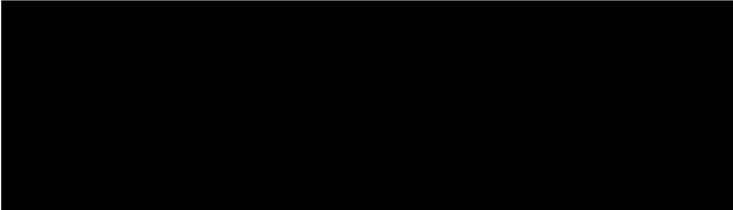
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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: EAC 02 002 53866 Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:



AUG 30 2005

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 employment based immigrant visa petition was denied by the Director, Vermont Service Center. The director affirmed the denial of the petition in response to the petitioner's motion to reconsider. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decisions of the director and AAO will be affirmed, and the petition will be denied.

The petitioner is a restaurant. It sought to employ the beneficiary permanently in the United States as a specialty chef. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

On March 12, 2002, the director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

The petitioner submitted a motion to reconsider, asserting that the director had failed to properly consider that the petitioner could have allocated funds paid out as officer compensation to the proposed salary of the beneficiary. The director rejected this rationale and affirmed the denial of the petition in its decision on July 10, 2002.

On November 18, 2003, the AAO dismissed the petitioner's appeal. The AAO reviewed the federal tax returns and other evidence previously submitted, as well as counsel's argument offered on appeal. The AAO affirmed the director's decision, concluding that petitioner's financial data failed to establish that it had the continuing ability to pay the beneficiary beginning as of the April 27, 2001 priority date of the visa petition.

Counsel submits a motion to reconsider, contending that the AAO should have considered the assertion that the officer compensation of \$61,500 as funds generated within the petitioning business, could have been allocated to pay the proffered salary and therefore should have been added to the consideration of the corporate petitioner's net income or net current assets.

Counsel's assertion is not persuasive. As noted by the director, monies already expended are not considered to be readily available to pay the proffered wage.¹ The proffered wage in this case is \$11.90 per hour, which amounts to \$24,752 per annum. The priority date established by the approved labor certification is April 27, 2001. As required by 8 C.F.R. § 204.5(g)(2), a petitioner must demonstrate its continuing ability to pay a certified wage offer beginning on the priority date of the petition. Evidence of such ability must include either annual reports, federal tax returns, or audited financial statements. The petitioner elected to submit a copy of its 2001 federal tax return in this matter. As noted in the previous director's decisions, the petitioner declared ordinary income² of \$11,999 in 2001. Schedule L of the corporate tax return reflects that the petitioner's net current assets were \$291. Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, 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 a resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1 through 6 and current liabilities are specified on line(s) 16 through 18. If a corporation's year-end net current assets are equal

¹ In certain specific circumstances, where there is credible evidence offered that a corporate officer could forego the distribution of compensation, such an argument might merit consideration. Here, the record contains no such evidence.

² For purposes of this review, ordinary income (line 21) will be treated as net taxable income.

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 reviewing a petitioner's ability to pay a proffered salary, CIS will also review whether a petitioner may have employed and paid wages to a beneficiary during a given period. In this case, although the ETA 750B indicates that the petitioner may have employed the beneficiary, the petitioner failed to submit any documentation of wages paid to the beneficiary.

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, 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. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross receipts exceeded the proffered wage is misplaced. Similarly, showing that the petitioner paid wages in excess of the proffered wage or reached a certain level of gross income is not convincing. 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.

Relying upon a similar reasoning, CIS will not add back the officer compensation or other elective deductions taken by a petitioner to the net income figure reflected on the corporate tax return. In this case neither the petitioner's net taxable income of \$11,999, nor its net current assets of \$291 could cover the proffered salary of \$24,752.

Counsel also urges consideration of the petitioner's financial status within the context of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Matter of Sonegawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. That case, 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 *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. 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 petitioner had 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.

In this case, the petitioner's 2001 corporate tax return fails to demonstrate that such unusual circumstances exist in this case, which parallel those in *Sonegawa*, or that this level of income is somehow uncharacteristic within a framework of profitable years. We cannot conclude that any projection of future earnings and profitability overcomes the AAO's decision to affirm the director's denial. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has presented sufficient persuasive evidence to demonstrate its continuing ability to pay the proffered wage as of the priority date of the petition. As such, the petitioner's motion does not overcome the grounds of dismissal as set forth in the AAO decision of November 18, 2003.

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 AAO's decision of November 18, 2003, dismissing the petitioner's appeal is affirmed. The petition remains denied.