



U.S. Citizenship
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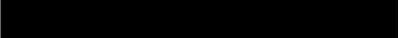
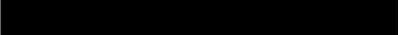


BG

FILE: 
EAC 03 191 53395

Office: VERMONT SERVICE CENTER

Date: DEC 14 2005

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health food store. It seeks to employ the beneficiary permanently in the United States as a manager, organic food and produce. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 states that the petitioner has the ability to pay the proffered wage. Counsel submits a brief.

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 not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) also provides

(ii) Other documentation--

(D) *Other Worker.* If the petitioner 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.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$1,184 a week, or \$61,568 annually. The beneficiary claimed on Form ETA 750 that he had worked for the petitioner since December 1996.

On the petition, the petitioner did not indicate when it was established, the current number of employees, or its gross or net annual income. The petitioner did submit IRS Form 1120, federal corporate income tax return, for the year 1997, as well as copies of the first pages of the petitioner's bank statements from Sovereign Bank, Reading, Pennsylvania, for the months June to July 2002. The 1997 income tax return submitted by the petitioner indicated taxable income of -\$237.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 21, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal income tax returns with all schedules and attachments, for the years 1998 to 2002. The director also stated that the petitioner could choose to submit other evidence to establish its ability to pay the proffered wage such as annual reports for the years 1998 to 2002 accompanied by audited or reviewed financial statements; a statement from a financial officer of the company that established the petitioner's ability to pay the proffered wage;¹ or, if the beneficiary was employed by the petitioner, copies of the beneficiary's 1998, 1999, 2000, 2001 and 2002 Forms W-2 Wage and Tax Statements. The director stated that additional evidence such as accredited profit/loss statements, bank account records, or personnel records might be considered but only as supplementary evidence to establish employer's ability to pay. With reference to the bank statements submitted with the initial petition, the director stated that this supplementary evidence must show that the petitioner's ending balances for the year were greater than or equal to the proffered wage, or it must show that the petitioner's monthly bank balances increased incrementally with the amount of funds necessary to pay the proffered wage.

With regard to the beneficiary's qualifications, the director stated that evidence of the beneficiary's previous work experience was not included with the initial filing. The director requested that the petitioner submit evidence to establish that the beneficiary possessed the requisite one year of experience as of January 14, 1998, the priority date. The director stated that such evidence should be in the form of letters from current or former employers or trainers and should include the name, address, and title of the writer, and a specific description of the duties performed by the alien or the training received.

Finally the director stated that it did not appear that the petition was approvable to classify the beneficiary as a third preference alien under section 2103(b)(3)(A)(i) of the Act because the labor certification application stated that one year of work experience was necessary to perform the duties of the proffered position. The director noted that this particular section of the Act was designated for positions requiring a minimum of two years of work experience. The director stated that section 203(b)(3)(A)(iii) is designated for positions requiring less than two years of work experience. The director stated that if the petitioner wished to change the requested preference classification, the petitioner should indicate this on the request of further evidence sheet.

¹ Perhaps because the petitioner did not establish the number of its employees on the initial petition, the director referred to a statement by a financial officer to establish the petitioner's ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2). "In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage."

In response, counsel submitted annual profit and loss reports, with a statement from the petitioner's owner in support of the petitioner's ability to employ the beneficiary. According to counsel, the reports showed the following net incomes: in 1997, \$341.28;² in 1998 \$30,372.31; in 1999, \$44,333.98; in 2000, \$71,741.89; in 2001, \$63,607.47; in 2002, \$76,986.10; and 2003, \$76,348.62. Counsel also stated that the petitioner was submitting a Dunn and Bradstreet Report that showed the petitioner's financial ability to pay the proffered salary and its credit worthiness in the business community. Counsel also submitted a letter of employment verification from the petitioner that stated they had employed the beneficiary from December 1996 to December 2000.

owner, stated in her letter with reference to the petitioner's annual profit and loss reports, that the petitioner's staff provided these reports to the petitioner's accountant in support of its ability to employ the beneficiary in the proffered position. stated that as the owner and financial officer of the petitioner, she certified under penalty of perjury that the profit and loss report figures were the petitioner's accurate figures. With regard to the Dunn and Bradstreet report referenced by counsel, this document is identified as a product of the Dunn and Bradstreet Small Business Reports facility, is dated October 12, 2003, and appears to be a compilation of publicly available information with regard to the petitioner's business operations, credit worthiness, in terms of financial stress and the petitioner's ability to pay its bills on time. Finally, with regard to the classification of the beneficiary in the instant petition, the petitioner indicated on the request for further evidence that it wished to consider the beneficiary as an unskilled worker, pursuant to section 203(b)(3)(A)(iii) of the Act.

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 June 30, 2004, denied the petition. In his decision, the director examined the petitioner's 1997 tax return and stated that the petitioner had a net loss of \$237 and current liabilities of \$80,262 over current assets. The director also stated that the petitioner's bank statements did not meet either criteria outlined in the request for further evidence. The director noted the profit and loss statements submitted by the petitioner in response to the request for further evidence and stated that the statements were created by and were based on the representation of management, and as such had little evidentiary value. The director noted the Dunn and Bradstreet document without comment as to its evidentiary weight, other than to say the document did not clearly document the petitioner's ability to pay the proffered wage. The director cited *Elatos Restaurant Corp. V. Sava*, 632 F. Supp. 1049 (S.D. N.Y. 1986) that held that Citizenship and Immigration Services (CIS) could rely on income tax returns as a basis for determining the petitioner's ability to pay the proffered wage, and that the CIS could also require documentary evidence such as wage and tax records. Based on the evidence submitted to the record, the director then stated that the evidence did not overcome the grounds for denied stated in EAC 02 093 53108.

On appeal, counsel examines the petitioner's 1997 federal income tax return. Counsel states that this return indicates that the petitioner earned \$1,800,809 in 1997, and that the petitioner had a gross profit of \$689,577 in the same year. Counsel also noted that the petitioner paid compensation to officers of \$40,040, and paid salaries to employees in the amount of \$350,084. Counsel then reiterates the profits or net income outlined in the profit and loss documents submitted by the petitioner in response to the director's request for further evidence. Counsel also examined further the Dunn and Bradstreet submitted to the record, and states that Dunn and Bradstreet are in the

² The profit and loss statement for 1997 reflects a net income of -\$341.28.

business of giving financial stability reports of corporations. Counsel states that the report indicate that financing is secured, that the total number of employees is 20, that the highest credit for the petitioner is \$48,650 and that the petitioner has a low risk of 1, and no negative factors to report such as extreme debt.

Counsel states that CIS gave no weight to this document and little weight to the petitioner's financial statements they were internally generated and created by and based on the representations of management. Counsel also asserts that the petitioner's circumstances are similar to those of the petitioner in *Matter of Sonogawa*, 12 I&N Dec. 612, 614-615 (BIA 1967). Counsel states that when the petitioner commenced the labor certification process in 1998, it had a low income; however, the documentation submitted to the record established that the petitioner has an expectation of continuing in business and an ability to pay the proffered wage. Counsel also states that by looking at all the evidence provided, CIS should have considered the petitioner's 2002 and 2003 profits of \$76,986 and \$76,348.62 respectively, as evidence of the petitioner's ability to pay the proffered wage.

In the initial petition, counsel for the petitioner submitted the first page of the petitioner's bank statements for January to July 2002. Counsel's reliance on bank statements 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), which includes federal income tax returns and audited financial reports, is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. It is noted that the petitioner only submitted its federal income tax return for 1997, and did not provide any federal income tax returns for 1998, 1999, 2000, 2001, or 2002. Since the priority date for the petition is January 14, 1998, the petitioner's federal income tax return for 1997 is not dispositive in these proceedings. Counsel did not provide any explanation for the submission of the petitioner's 1997 income tax return, for the non-submission of the petitioner's income tax returns from 1998 to 2003, and for why the petitioner's bank statements should be given more probative weight than the petitioner's federal income tax returns. 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 for seven months of 2002 somehow reflect additional available funds that were not reflected on its 2002 tax return, which, as previously stated, was not submitted by counsel with the initial petition, in response to the director's request for further evidence, or on appeal. Finally, as previously stated, the priority date for the instant petition is January 14, 1998. As such, the petitioner's bank statements balances for seven months of the year 2002 are not relevant to establishing the petitioner's ability to pay the proffered wage in 1998.

With regard to the profit and loss statements submitted by the petitioner in response to the director's request for further evidence, counsel's reliance on unaudited financial records is also 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In reference to the Dunn and Bradstreet document submitted by counsel to record in response to the director's request for further evidence, this document is also viewed as an unaudited document that has no relation to the actual available financial assets of the petitioner that could be used to pay the proffered wage of \$61,568. While

such a document could be used for comparative purposes in judging the creditworthiness of the petitioner in contrast to other food stores, its contents are not relevant to the present proceedings, and to the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. Although the beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner from December 1996, and the petitioner also stated in its letter of employment verification that the beneficiary worked for the petitioner from December 1996 to December 2000, the petitioner provided no evidentiary documentation for the claimed employment, such as Forms W-2 or Forms 1099-MISC. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998 and onward.

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 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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, now CIS, should have considered income before expenses were paid rather than net income. As previously stated, the petitioner only submitted its federal income tax return for 1997 to the record. Based on the petitioner's priority date of January 14, 1998, this tax return is not probative of the petitioner's ability to pay the proffered wage. Furthermore, the petitioner did not submit any other federal income tax returns for the period from 1998 to 2002. Therefore, the AAO cannot examine the petitioner's ability to pay the proffered wage from 1998 to 2002 based on its net income or, as outlined further in these proceedings, on its net current assets.

Nevertheless, to illustrate further the petitioner's ability to pay the proffered wage based on its net income and net current assets, and to clarify the director's comments, the AAO will examine the petitioner's 1997 federal income tax return. For tax year 1997, line 28, taxable income before net operating loss deduction and special deductions, reflects the petitioner's taxable income as -\$237. This figure is not sufficient to establish the petitioner's ability to pay the entire proffered wage.

However, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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. Its 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 out of those net current assets. The tax returns reflect the following information for the following years:

	1997
Taxable income ⁴	\$ - 237
Current Assets	\$ 166,731
Current Liabilities	\$ 219,419
Net current assets	\$ -52,688 ⁵

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1997. In 1997, as previously illustrated, the petitioner shows a taxable income of -\$237, and negative net current assets of -\$52,688 and has not, therefore, demonstrated the ability to pay the proffered wage. As stated previously, the petitioner submitted no federal income tax returns for the period of time from the January 14, 1998, the priority date, to 2002. Therefore the petitioner did not establish that from 1998 to 2002, it has the ability to pay the proffered wage based on its net income or net current assets.

In addition, without more evidence, the petitioner has not demonstrated that any other funds were available in 1997 to pay the proffered wage. For example, although on appeal counsel asserts that the Dunn and Bradstreet document provides additional support for the petitioner's ability to pay the proffered wage, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). In addition, the Dunn and Bradstreet document was prepared in 2003, and would not be material evidence as to the petitioner's financial assets in 1997, or in the relevant years of 1998 to 2003.

On appeal, counsel also refers to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). This precedent decision 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

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.

⁴ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

⁵ The director in his decision stated the petitioner had liabilities of \$80,262 over current assets. The record is not clear how the director calculated this figure. As stated above, the petitioner's correct net current assets figure for 1997 is -\$52,688.

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.

While the petitioner in *Sonegawa* had a negligible net income in the year in which it filed a labor certification application, the record is devoid of any information as to the petitioner's net income in 1998, the year its labor certification application was processed by the Department of Labor. There is no way to compare the following years after the priority dates in either *Sonegawa* or the instant petitioner, because the instant petitioner has not submitted its federal income tax returns, or audited annual reports to the record for examination. More importantly neither counsel nor the petitioner has provided any explanation of why the petitioner's federal income tax returns are not found on the record. It is noted that counsel states that based on the petitioner's unaudited profit and loss statements, the petitioner had sufficient net income in 2002 and 2003 to pay the entire proffered wage; however, as previously stated, the AAO does not accept unaudited financial statements. Thus, even for the years in which the petitioner perhaps could have established its ability to pay the proffered wage, neither counsel nor the petitioner has provided the relevant federal income tax returns for further examination of this issue.

Furthermore, in contrast to the petitioner in *Sonegawa*, the instant petitioner has submitted no further significant documentation to the record with regard to its sound business reputation, and/or outstanding reputation as a health food store. While the computer-generated Dunn and Bradstreet report can be viewed as a generic tool in assessing the petitioner's comparative business reputation, by itself and in the absence of such basic documentation as federal income tax returns, this document is not sufficient to establish that the totality of the petitioner's circumstances are such that it has the ability to pay the proffered wage. In addition, it is noted that only on appeal, has the petitioner established such fundamental information items as its number of employees, and the year of its establishment. The director is not bound to consider the totality of a petitioner's circumstances when neither counsel nor the petitioner has provided an accurate picture of the petitioner's circumstances.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.