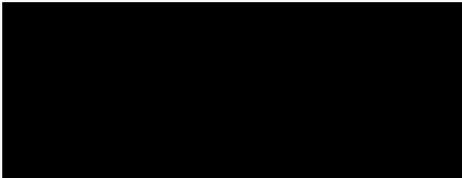


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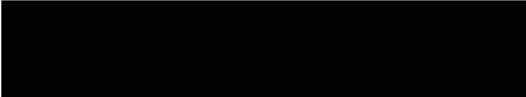
EAC 03 210 51595

Office: VERMONT SERVICE CENTER

Date: DEC 15 200

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition 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 a retail donut store. It seeks to employ the beneficiary permanently in the United States as a manager. A Form ETA 750, duplicate Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits:

- The petitioner's payroll journal showing the beneficiary received \$7,900 in year-to-date wages paid as of August 7, 2004;
- The petitioner's Form 1120S for 1998 (resubmitted);
- The petitioner's unsigned Form 941 Employer's Quarterly Federal Tax Return for the quarter ending March 2004; and,
- A letter dated August 10, 2004, from ██████████ United Bank asserting that the petitioner's average balance for the years 1998 through 2003 was \$19,324.81.

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 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. See 8 CFR § 204.5(d). 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 January 14, 1998.¹ The proffered wage as stated on the duplicate Form ETA 750 is \$30.81 per hour or \$64,084.80 per year. The Form ETA 750 states that the position requires two years experience.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$1.02 million, and to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year lasts from January 1 to December. On the Form ETA 750B, signed by the beneficiary on January 3, 1998, the beneficiary did not claim to have worked for the petitioner.

¹ In his response to the Request For Evidence (RFE), counsel asserts that the Department of Labor certified the original ETA-750 on behalf of ██████████ replaced as the named beneficiary by ██████████ whom the instant beneficiary in turn replaced. The response also included a June 11, 2003 letter withdrawing the said ██████████ Form I-140 petition.

With the petition, filed June 24, 2003, the petitioner submitted the following documents:

- A duplicate ETA 750 filed on behalf of [REDACTED] and,
- The petitioner's Form 1120S returns for 1998-2001.

On March 17, 2004, the director requested additional evidence pertinent to that ability to pay the proffered wage. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested, as alternatives, the petitioner's annual reports for 1998 and 2002 accompanied by audited or reviewed financial statements.

In response, the petitioner submitted:

- Counsel's letter of June 10, 2004;
- The June 11, 2003 withdrawal letter previously filed on behalf of [REDACTED]
- The petitioner's payroll journal showing the wages the beneficiary received from April 17, 2004 to June 5, 2004;
- The petitioner's Form 1120S return for 2002;
- The joint Form 1040 returns of [REDACTED] for 1999-2002;
- Mr. [REDACTED]'s business bank account at [REDACTED] United Bank for the period December 16, 2003, to April 30, 2004; and,
- Bank accounts at the same bank for parts of 2004 for [REDACTED] Inc. [REDACTED] D.F. Donuts [REDACTED] Donuts Inc. of [REDACTED] along with bank account sheets listing average total deposits for February 2004-April 2004.

The director denied the petition on July 19, 2004, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that its gross receipts and net income figures with depreciation deductions added back, exceeded the proffered wage and accordingly showed the ability to pay the proffered wage. Further, counsel asserts that because [REDACTED] personal income for the pertinent years exceed the proffered wage and thus are relevant in determining the petitioner's ability to pay the proffered wage, the evidence establishes the petitioner's such ability to pay the proffered wage. Counsel also asserts that the assets of other corporations owned by [REDACTED] sufficient to establish the petitioner's ability to pay the proffered wage. Counsel also asserts that the director erred in calculating net current assets for the pertinent years. Finally, counsel asserts that the beneficiary is currently on the petitioner's payroll, which establishes the beneficiary's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner has established that it employed and paid the beneficiary \$7,600 but only since April 2004. Therefore, the petitioner has not established that it employed and paid the beneficiary any wages during the period from the priority date through the pertinent date.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 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 the 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.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$64,085 per year from the priority date.

In 2002, the Form 1120S stated net income² of \$539.
In 2001, the Form 1120S stated net income of \$12,719.
In 2000, the Form 1120S stated net income of \$2,920.
In 1999, the Form 1120S stated net income of \$15,148.
In 1998, the Form 1120S stated net income of \$5,044.

Therefore, for none of the pertinent years did the petitioner have the ability to pay the proffered wage.

CIS will next review the petitioner's assets. We reject, however, the counsel's suggestion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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

² Ordinary income (loss) from trade or business activities as reported on Line 21.

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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the pertinent years were:

<u>Tax Year</u>	<u>Net Current Assets</u>	<u>Surplus Above/(Deficit Below) The Proffered Wage</u>
2002	\$48,316	(\$15,769)
2001	\$30,338	(\$33,746)
2000	\$25,341	(\$38,744)
1999	\$9,108	(\$54,977)
1998	\$39,810	(\$24,275)

Therefore, 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 continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel 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. Counsel proposes his own definition of "net current assets," which he asserts, "is derived from total assets less current liabilities and financial obligations."

Using his definition, "net current assets" for 1998 is:

<u>Total Assets, Line 15 of Schedule L....</u>	\$538,108
Current Liabilities, Line 18	\$6,291
Shareholder Loans, Line 19	\$85,861
Mortgages, notes 1-+ years, Line 20	\$432,854
<u>Total Current Liabilities and Financial Obligations</u>	\$525,006
 <u>"Net Current Assets"⁴</u>	 \$13,102

However, even under counsel's modified definition of net current assets,⁵ the petitioner's "net current assets" are less than the proffered wage and fail to establish the petitioner's ability to pay the proffered wage.

³According 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.

⁴Counsel's modified definition of net current assets.

⁵ An employer is less likely to convert such assets to cash for paying the beneficiary's wage.

Counsel's assertion that the assets or income shown on [REDACTED] Form 1040 returns is also not persuasive. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Moreover, without documenting the assets and liabilities of each such outlets, counsel fails to establish that combining them would result in net current assets rather than net current liabilities.

Finally, counsel misplaces his reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in asserting that CIS should approve the petition despite low net income and low net current asset figures relative to the proffered wage. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years. 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. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

While losses during some years and very low profits during others may be uncharacteristic of the instant petitioner, counsel has not established that such low profits or losses occurred within a framework of profitable or successful years, as in *Sonogawa*. Here, the petitioner is a much newer business, and the record fails to establish that the petitioner has ever posted a net income sufficient to pay the proffered wage. Assuming that the petitioner's business will flourish, whether or not it hires the beneficiary, is accordingly speculative.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the 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.