

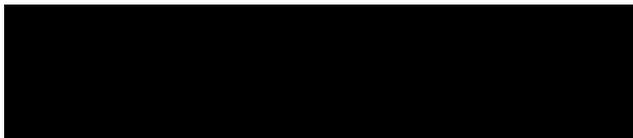
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U.S. Department of Homeland Security
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U.S. Citizenship
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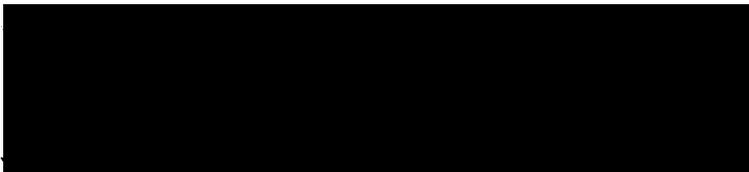
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FILE: IIN 03 226 50023 Office: NEBRASKA SERVICE CENTER Date: DEC 19 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a health, beauty, and tanning salon. It seeks to employ the beneficiary permanently in the United States as a cosmetician supervisor. 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 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 granting 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$22.75 per hour, which equals \$47,320 per year.

On the petition, the petitioner stated that it was established on July 11, 1997 and that it employs four workers. The petition states that the petitioner's gross annual income is \$156,418 and that its net annual income is \$118,190. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Chicago, Illinois.

In support of the petition, the petitioner submitted copies of its monthly bank statements and a copy of its the first pages of its 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation. The tax returns show that the petitioner is a corporation, that it incorporated on July 11, 1997, and that it reports taxes pursuant to the calendar year.

The 2001 return shows that the petitioner declared a loss of \$2,026 during that year. Because the corresponding Schedule L was not submitted the Service Center was then unable to calculate the petitioner's net current assets.

The 2002 return shows that the petitioner declared a loss of \$802 during that year. Because the corresponding Schedule L was not submitted the Service Center was then unable to calculate the petitioner's net current assets.

Counsel also submitted a letter, dated June 24, 2003, from its then attorney. That letter cites the petitioner's gross receipts, its gross profits, and its depreciation deduction are indices of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Further, counsel states that during 2003, "The petitioner had \$30,673 in cash flow from rents (paid to the company but deducted from income)" This office notes that the petitioner's 2003 tax return shows rent expense of \$30,673, but that the corresponding Schedule D shows no rental income.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on February 9, 2004, requested, *inter alia*, additional evidence pertinent to that ability.

In response, the petitioner's previous counsel submitted the first pages of the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation and a complete copy of the petitioner's 2003 Form 1120S return. One of the portions missing from both the petitioner's 2001 and 2002 return is the Schedule L, without which the petitioner's end-of-year net current assets cannot be calculated.

The 2003 return shows that the petitioner reports taxes pursuant to cash convention and that it declared ordinary income of \$2,295 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$2,181 and current liabilities of \$502, which yields net current assets of \$1,679.

In a cover letter, dated February 25, 2004, counsel stated that during 2001,

The petitioner had \$30,237 in cash flow from rents (paid to the company but deducted from income) and \$11,186 in depreciation (a tax item not affecting available cash). Within these sums are funds to pay the beneficiary's offered wage.

As to 2003 counsel stated that,

The petitioner had \$30,673 in cash flow from rents (paid to the company but deducted from income) and \$5,411 in depreciation (a tax item not affecting available cash). Within these sums are funds to pay the Beneficiary's offered wage.

Counsel also argued that the petitioner's gross receipts, gross profit, and bank statements show its ability to pay the proffered wage.

The 2001 return shows rent expense of \$30,237. Because counsel did not submit the petitioner's 2001 Schedule D the record does not demonstrate that the petitioner received any rental income.

The 2003 return shows rent expense of \$30,673. The corresponding Schedule D shows that the petitioner received no rental income during that year.

The evidence does not support counsel's assertion that the petitioner received rental income during 2001. The evidence contradicts counsel's assertion that the petitioner received rental income during 2003.

Further, the record of proceedings contains no evidence to support the assertion that the petitioner's rent expense is discretionary. The assertions of counsel are not evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 21, 2004, denied the petition.

On appeal, counsel submits additional bank statements and reiterates the argument that the petitioner's bank statements show its continuing ability to pay the proffered wage beginning on the priority date. Counsel also states that the beneficiary "is a highly skilled esthetician with an extensive following of clientele" and that by hiring her the petitioner expects to improve its volume and profitability. Counsel argues that, pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) CIS should find that the petitioner has shown the ability to pay the proffered wage, notwithstanding that its net income during the salient years was less than the proffered wage.

Counsel submits compiled balance sheets with the appeal and notes the amount of the petitioner's total assets as stated therein. Counsel argues that the petitioner's assets show its continuing ability to pay the proffered wage beginning on the priority date and cites a non-precedent decision of this office as authority for the proposition that they should be considered.

Initially, this office notes that the decision cited by counsel, if counsel has correctly quoted it, does not support the proposition that the petitioner's total assets should be considered in determining its ability to pay additional wages. That decision considered a petitioner's Net Current Assets. The difference is explained in detail below.

Second, although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Third, 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. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The

unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.¹ 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 reported on its tax returns.

Counsel's argument that the petitioner's gross receipts and gross profit show its ability to pay the proffered wage is unconvincing. Showing that the petitioner's gross receipts and gross profits² exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses³ or otherwise increased its net income,⁴ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is similarly unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

¹ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

² Gross Receipts are the sum of all of the petitioner's receipts from operations, before any expenses are subtracted. Gross Profit is the amount remaining after Cost of Goods Sold is subtracted, but before Operating Expenses. As such, Gross Profit is only an interim measure between Gross Receipts and Net Profit. It is not a valid index of the petitioner's ability to pay additional wages.

³ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁴ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs. Counsel appears to be asserting that the real and, in some instances, large cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Even if this office were inclined to accept counsel's argument pertinent to the depreciation schedule, that scenario would be unacceptable.

The meaning of counsel's statement that "The petitioner had \$30,237 in cash flow from rents (paid to the company but deducted from income) . . ." is unclear. The portions of the 2001, 2002, 2003 tax returns submitted show rent expense of \$30,237, \$25,616, and \$30,673 during those years, respectively. They show no rental income. The only indication in the record of any rental income is counsel's assertion. The assertions of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.⁵

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid 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 a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may

⁵ If counsel is asserting that the petitioner itself, Cockatoo Tanning, Incorporated, owns some rental property, either the one in which it does business or some other, counsel failed to provide evidence in support of that assertion. In fact, the 2003 return appears to contradict that assertion. If, on the other hand, counsel is asserting that some other entity, such as the petitioner's owner, owns rental property, the rent from that property would be irrelevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

This is because the petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). 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). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$47,320 per year. The priority date is April 27, 2001.

The petitioner declared a loss of \$2,026 during 2001. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its profits during that year. Because the petitioner's 2001 Schedule L was not submitted this office cannot calculate the petitioner's net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage with its net current assets. The petitioner submitted no other reliable evidence to demonstrate its ability to pay the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2001.

The petitioner declared a loss of \$802 during 2002. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its profits during that year. The petitioner did not submit its 2002 Schedule L. The petitioner's 2003 Schedule L, however, shows that at the beginning of that year, and therefore at the end of 2002, the petitioner's current liabilities exceeded its current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage with its year-end net current assets during 2002. The petitioner submitted no other reliable evidence to demonstrate its ability to pay the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$2,295. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$1,679. That amount is also insufficient to pay the proffered wage. The petitioner submitted no other reliable evidence to demonstrate its ability to pay the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

Counsel asserts that the petition may still be approved notwithstanding that its net income and net current assets do not demonstrate its ability to pay the proffered wage, citing *Matter of Sonogawa, supra*.

Counsel's citation of *Sonegawa* is not entirely on point. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. The petitioning entity in *Sonegawa* 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.

In *Sonegawa*, 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 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 couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the petitioner has not posted a consistent profit; rather it posted losses during two of the three salient years. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001, 2002, and 2003 were uncharacteristically unprofitable years for the petitioner.

Further, although counsel asserts that the beneficiary's customers will follow her when she begins to work for the petitioner, no evidence in the record indicates that the beneficiary has plied her trade anywhere except Poland. Without substantial evidence this office will not accept the assertion that the beneficiary would bring a considerable clientele with her to the petitioner, either from Poland, or from any other locations where she may have worked.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.