

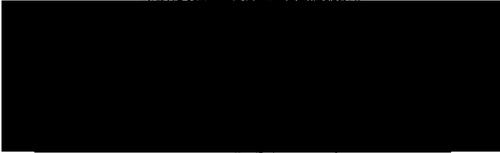


U.S. Citizenship
and Immigration
Services

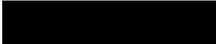
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FILE:



Office: VERMONT SERVICE CENTER

Date: DEC 21 2005

EAC 04 018 51752

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 preference visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial 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 additional evidence and contends that the petitioner has demonstrated its continuing financial ability to pay the proffered wage.

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 filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$27,500 per year. On Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary does not claim to have worked for the petitioner.¹

In support of its ability to pay the proffered salary, the petitioner submitted a statement from [REDACTED] the petitioner's president. He states that he is seeking to employ someone to operate the restaurant for him. He claims that when he was unable to find anyone, he took all of the net profits of the business as his personal compensation as reported on line 12 of the tax return. [REDACTED] states that if he had been able to find someone, a portion of this money would have been used to satisfy the salary obligation. He then affirms that in 2002, he was able to find someone and that "the salary is shown on Line 8 and that my compensation was also reduced because I reduced my hours. The corporation notwithstanding those two (2) payments still made

¹ It is noted that on the G-325 biographic form filed in connection with his application for permanent resident status (I-485), the beneficiary states that he has worked for the petitioner since September 2000.

sufficient money to pay the full wages of a manager.” It is noted that no other documentation other than the 2001 tax return was submitted with the petition. [REDACTED]’s reference to line 8 is unclear as line 8 shown on the 2001 tax return to be “capital gain net income” with no amount stated.

The petitioner also provided a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It indicates that the petitioner files its taxes uses a standard calendar year. It shows that the petitioner reported gross profit of \$91,625, officer compensation of \$46,400, no salaries or wages, no cost of labor, and net taxable income of \$-0- before the net operating loss (NOL) deduction. Schedule L of the tax return reveals that the petitioner had \$852 in current assets and no current liabilities, resulting in \$852 in net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner’s net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation’s year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation’s year-end 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.

On August 4, 2004, the director denied the petition, concluding that neither the petitioner’s reported net income of \$-0-, nor its net current assets of \$852 could support the payment of a proposed wage offer of \$27,500 per year.

On appeal, counsel resubmits the letter from [REDACTED] and asserts that it supports the petitioner’s ability to pay the proffered wage because a portion of the officer compensation could have been diverted to pay the proffered wage. As noted above, [REDACTED] reference to his 2002 efforts to locate an employee to help him in the business and subsequent reduction of his officer compensation are not supported by any documents submitted to the record. As indicated by counsel’s original transmittal letter, dated October 20, 2003, one tax return was offered to the record.

In this case, CIS will not consider the officer compensation presented on the petitioner’s tax returns simply because it may have been paid to the petitioner’s president. Such compensation is paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. It is also noted that the amount designated as officer compensation would have to sustain a comparatively significant reduction (almost 60%) in order to increase the net income to a level sufficient to meet the proffered wage. There is also no first-hand evidence that the petitioner’s president was able to forego approximately 60% of his compensation during the period given. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner’s directors should be included in the examination of the petitioner’s ability to pay the proffered wage. In rejecting consideration of such individual assets, the court 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.” Similarly, the financial information presented on the other corporation’s tax returns cannot be included in the consideration of the petitioning corporation’s individual ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, 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.

Counsel also provides two letters on appeal. One letter, dated July 12, 2004, is signed by [REDACTED] as the Vice-President of Academic Affairs at Seattle Pacific University. Counsel provides this letter in support of this university's right to issue evaluations of matters dealt with by CIS. The letter from [REDACTED] is addressed to a third party and merely offers an that university faculty are equipped to assess college credit that may be given for an individual's training and experience. In the instant matter, the beneficiary's qualifying work experience is not at issue, so [REDACTED]'s letter is not relevant.

The other letter, dated August 24, 2004, is from a finance professor at Seattle Pacific University, [REDACTED] Ph.D. This letter addresses the petitioner's ability to pay the proffered wage. [REDACTED] states that he has reviewed a "significant portion of the petitioner's 2001, 2002, and 2003 tax returns." He concludes that although the 2001 tax return does not show an ability to pay the proffered wage, the petitioner's reported increases in net profit in 2002 and 2003 show significant growth. He also states that the balance sheets in 2001, 2002, and 2003 show that the petitioner's current assets do not exceed the current liabilities by an amount to pay the proffered salary of \$27,500. He asserts, however, that the low cash levels were caused by the large cash withdrawals by the owners and that it would be reasonable to assume that they were optional and could have been retained in the business to pay expenses such as the proffered wage. [REDACTED] concludes that the most relevant figure to gauge the petitioner's ability to pay the proffered wage is the net profit reported by the petitioner in an amount, which exceeded the proffered wage in both 2002 and 2003.

We are unable to confirm any of [REDACTED] opinions as to the petitioner's net income or net current assets in any year but 2001, as the petitioner has not provided the 2002 or 2003 returns to the underlying record or on appeal. As such, his letter cannot be considered probative of the petitioner's ability to pay the proffered wage. It is emphasized that the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to submit federal tax returns, annual reports, or audited financial statements in order to demonstrate that a petitioner has maintained a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) In this case the priority date is April 30, 2001.

In determining a petitioner's ability to pay a certified wage, CIS will examine whether a petitioner may have employed and paid wages to a beneficiary during a given period. If a petitioner establishes by credible 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. If either the petitioner's net taxable income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, no evidence has been submitted to establish that the petitioner employed and paid wages to the beneficiary.

CIS will then examine the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. Additionally, it will review a petitioner's current assets and current liabilities as reflected on Schedule L of the tax return as an alternative method of determining a petitioner's ability to pay the proffered wage. 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*, 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.

In this case, as noted by the director, the petitioner's 2001 tax return shows no reported net income and \$852 in net current assets. These figures do not reflect sufficient funds to pay the proffered wage of \$27,500. The petitioner has not demonstrated its ability to pay the proffered wage.

Counsel asserts that pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the petitioner's ability to pay the certified wage may be based on the expectations of increasing business. Counsel is correct that *Matter of Sonogawa* 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 *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner, a six-year operation at the time of filing the petition, has presented one income tax return showing no net income and \$852 in net current assets. It cannot be concluded that this represents a framework of success such as that discussed in *Sonogawa* and that the petitioner has demonstrated that such unusual circumstances exist in this case, which parallel the facts set forth in that case.

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition. 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.