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U.S. Citizenship
and Immigration
Services

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FILE:

WAC 03 029 54616

Office: CALIFORNIA SERVICE CENTER

Date: FEB 01 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, California 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 jewelry manufacturer. It seeks to employ the beneficiary permanently in the United States as a sales manager. 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.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 March 23, 2001. The proffered wage as stated on the Form ETA 750 is \$43,000 per year.

On the petition, the petitioner stated that it was established on October 24, 1989 and that it employs 17 workers. 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 Los Angeles, California.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$105,306 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On January 22, 2003 California Service Center requested, *inter alia*, additional evidence pertinent to the petitioner's ability to pay the proffered wage. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning in 2001.

The Service Center also specifically requested (1) copies of the petitioner's California Form DE-6 Wage Reports for the previous four quarters, (2) the job title and job description of each of the petitioner's employees, and (3) copies of the petitioner's 2001 and 2002 W-3 transmittal statements.

In response, counsel submitted (1) copies of the petitioner's California Form DE-6 Quarterly Wage Reports for all four quarters of 2002, (2) the job titles of each of the petitioner's employees, (3) copies of the petitioner's 2001 and 2002 W-3 transmittal statements, and (4) a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return.

The Form DE-6 Wage Reports show that the petitioner employed 16 to 18 workers during those quarters, but did not employ the beneficiary. The 2002 tax return shows that the petitioner declared a loss of \$34,449 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted a letter, dated April 15, 2003, from an accountant. That letter states that the petitioner's ability to pay the proffered wage during 2002 is demonstrated by adding the amount of its depreciation deduction for that year, its shareholder compensation, and the amount the petitioner paid to its owner during that year, to the petitioner's net loss. The accountant states that the resulting figure, being greater than the annual amount of the proffered wage, shows the petitioner's ability to pay the proffered wage during 2002.

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 April 28, 2003, denied the petition.

On appeal, counsel argues (1) that the petitioner incurred an extraordinary, non-recurring expense during 2002 by opening a new branch store, (2) that the petitioner's asset-to-liability ratio indicates that it is financially healthy, and (3) that the petitioner's expansion plans evince a continuing ability to meet its obligations, including paying the proffered wage.

In a brief filed to supplement that appeal counsel emphasized the April 15, 2003 opinion of the petitioner's accountant. Counsel cited *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the propositions that a petitioner can show the ability to pay the proffered wage even though its net income is less than the proffered wage and that CIS must consider all relevant factors. This office accepts both of those propositions.

Counsel submits a transcript of a November 16, 1994 teleconference between members of an immigration attorneys' association and representatives of CIS' Eastern Service Center, now the Vermont Service Center. That transcript contains eleven questions posed by the attorneys to the Service Center representatives and the eleven

responses. Which of those questions and responses counsel thought were relevant to the instant case, if any, is unclear to this office. That exhibit will not be further addressed.

In addition, counsel cites a Federal district court decision, *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), for the proposition that resources pledged to a church must be considered in determining its ability to pay a proffered wage and, by extension, that payments made by the petitioner at the petitioner's owner's discretion must also be considered in the determination of the petitioner's ability to pay the proffered wage.

The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a piano teacher. Here, counsel is asserting that CIS should consider payments the petitioner made to the petitioner's owner as funds available to pay the proffered wage. Other than counsel's assertion, however, the record contains no indication that the petitioner's owner could and would have forgone compensation and repayment of an existing debt, either permanently or temporarily. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Those payments were made out of the petitioner's funds, thus reducing the funds available to pay the proffered wage, and the record contains no evidence that it could have elected not to make them.

Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered.

Although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds. The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage. Further, the holding in *Masonry Masters* is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns.

While that decision urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary will generate income and to guess at the amount. If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no evidence that the income generated by the beneficiary would effectively offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

Finally, counsel argues, "The business expansion and long-term plans of petitioner enhances [sic] its ability to support the beneficiary's position." Counsel states that the petitioner's expenses during 2002 included

expenses related to opening a new store, which start-up costs are extraordinary and non-recurring, and caused the petitioner to report negative taxable income during 2002.

Counsel fails to identify and segregate the costs related to opening a new store. With those extraordinary and non-recurring expenses unquantified, this office cannot consider whether to disregard those expenses or to add them back to the petitioner's net profits.

The assertion, made by the accountant and reiterated by counsel, that the petitioner's depreciation deduction should be considered in the determination of the petitioner's ability to pay the proffered wage is unconvincing. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a 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. 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.

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.

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 that 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 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).

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 CIS should have considered income before expenses were paid rather than net income.

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 \$43,000. The priority date is March 23, 2001.

The petitioner declared net operating loss deduction and special deductions of \$105,306 during 2001. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss of \$34,449 as its taxable income before net operating loss deduction and special deductions. The petitioner cannot demonstrate the ability to pay any portion of the proffered wage out of its income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the propositions that the petitioner can show the ability to pay the proffered wage even though its net income is less than the proffered wage during a salient year and that CIS must consider all relevant factors. Although this office agrees with both points the citation does not demonstrate that the instant petition should be approved.

Matter of Sonogawa, supra 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 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 *Sonogawa*, 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if the losses during some years and very low profits during others are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses might be overlooked in determining ability to pay the proffered wage.

Toward that end, counsel has demonstrated that the petitioner opened a new store during 2002. Counsel asserts, but does not demonstrate, that the petitioner's loss during that year was a direct result of extraordinary and non-recurring expenses associated with opening that store.

Had counsel demonstrated that the amount the petitioner invested¹ in that new enterprise during 2002 equaled or exceeded the amount of the petitioner's loss during 2002 and the amount of the proffered wage, then this office might consider whether the expense was non-recurring and whether the petitioner had, thereby, demonstrated its ability to pay the proffered wage pursuant to the exception carved out in *Sonegawa*. The record contains no such evidence. That the petitioner opened a new store during 2002 does not, in itself, demonstrate the ability to pay the proffered wage during that year.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. 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.

¹ This amount invested would include only the petitioner's equity investment, net of any borrowed capital.