

identity information collected to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

PUBLIC COPY



U.S. Citizenship
and Immigration
Services



B6

FILE: [REDACTED]
LIN 03 022 52190

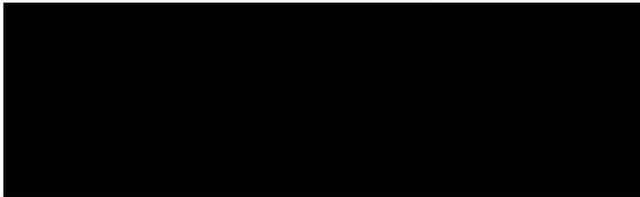
Office: NEBRASKA SERVICE CENTER

Date: JAN 12 2005

IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

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 jewelry and watch retailer and repairer. It seeks to employ the beneficiary permanently in the United States as a watchmaker. 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 May 9, 2001. The proffered wage as stated on the Form ETA 750 is \$17.25 per hour, which equals \$35,880 per year.

On the petition, the petitioner stated that it was established on July 1, 1946 and that it employs 26 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 would employ the beneficiary in Grand Rapids, Michigan.

In support of the petition, counsel submitted the petitioner's reviewed 1998, 1999, 2000, 2001, and 2002 financial statements. The accountant's report that accompanied those financial statements makes clear that the petitioner's management produced them and an accountant reviewed them, but that the accountant did not audit them.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Director, Nebraska Service Center, on January 13, 2003,

requested additional evidence pertinent to that ability. 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 on the priority date. The Service Center also specifically requested that the petitioner submit copies of its Form 941 Employer's Quarterly Federal Tax Returns.

In response, counsel submitted (1) photocopies of bank statements pertinent to an account held by the petitioner, (2) photocopies of the Form 941 quarterly returns for all four quarters of 2001 and all four quarters of 2002, and (3) copies of the petitioner's Michigan Form UA 1017 Wage Detail Reports for all four quarters of 2001 and all four quarters of 2002. The Wage Detail Reports appears to indicate that the petitioner employed between 69 and 95 workers during that period, but did not employ the beneficiary.

Counsel also submitted a photocopy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports taxes based on a fiscal year running from February 1 of the nominal year to January 31 of the following year. During its fiscal year 2001, which ran from February 1, 2001 to January 31, 2002, the petitioner declared a loss of \$227,014 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.

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 September 17, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's depreciation deduction, amortization deduction, and any extraordinary one-time charge offs should be added to the petitioner's profits to show the petitioner's ability to pay the proffered wage during a given year. Counsel cites various non-precedent decisions in support of those assertions. 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 non-precedent decisions is of no effect.

Counsel submits an affidavit, dated November 14, 2003, from a vice-president of the petitioner. In that affidavit, the vice-president attests that the petitioner expects an increase in business based on improvements in the economy in general and increased popularity of high-quality mechanical watches. The vice-president also states that the petitioner has employed one of its watchmakers for over 20 years, and "It is anticipated that [that other watchmaker] will retire in the not too distant future], thus freeing the amount he has been paid for payment of the proffered wage.

Counsel asserts that, even if the petitioner does not show the continuing ability to pay the proffered wage beginning on the priority date, the petition should be approved pursuant to the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), based on the petitioner's reasonable expectation of an increase in business.

Matter of Sonogawa relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful 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 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 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 record contains no reliable evidence that the petitioner has ever posted a profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the petitioner's 2001 fiscal year was an uncharacteristically unprofitable year for the petitioner. The petitioner's owner asserts that interest in expensive mechanical watches is increasing, but provides no evidence that this asserted trend will continue. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel's assertion that depreciation deductions and amortization deductions should be added back into income is unconvincing. A depreciation or amortization 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 those long-term assets, to represent the allocation of the value of those assets to various years during their useful lives, or to represent the accumulation of funds necessary to replace perishable those assets. The value lost as assets deteriorate or are otherwise depleted 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.

Counsel urges that various other deductions taken on the petitioner's tax return should also be added back into the petitioner's income in the determination of its ability to pay the proffered wage. Those deductions include unfunded officers' deferred compensation, LIFO adjustments, a one-time write-off associated with closing a store, the petitioner's corporate office rent expense¹, and an adjustment to earnings. Counsel asserts that the

¹ Counsel asserts, but provides no evidence to demonstrate, that the rent for the petitioner's corporate offices has been renegotiated at a substantial savings, but provides no evidence of that assertion, and does not quantify those alleged savings.

petitioner's reported losses were losses occasioned by those various non-cash deductions, were for tax purposes only, and do not accurately reflect the petitioner's true cash position.

Counsel's assertion that the net income shown on the petitioner's tax return is a poor indicator of the petitioner's cash position is inapposite. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely exclusively upon tax returns to demonstrate its ability to pay the proffered wage. Having elected to demonstrate the petitioner's ability to pay the proffered wage with its tax returns, however, it may not opt to ignore various deductions taken on that return.

Counsel and the petitioner's vice-president both implicitly assert that the wages paid to its veteran watchmaker should be included in the determination of the petitioner's ability to pay the proffered wage. However, the assertion that "[i]t is anticipated that [the other watchmaker] will retire in the not too distant future," is insufficient to show that his wages were available for payment of the proffered wage beginning on the priority date, and insufficient to show that they will be immediately available upon hiring the beneficiary.

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 its tax return paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot generally 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 somehow reflect additional available funds that were not reflected on its tax returns.

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 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 \$35,880 per year. The priority date is May 9, 2001.

During its 2001 fiscal year, which began on February 1 of that year, the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its income during that fiscal year. The petitioner ended that fiscal year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available during that fiscal year to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its fiscal year 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during its fiscal year 2001. 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.