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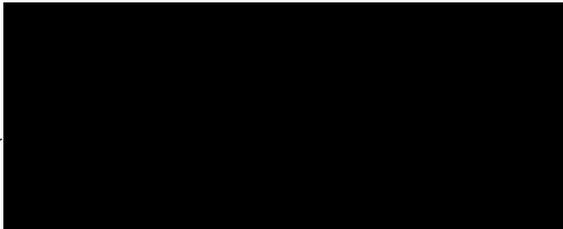
FILE: [REDACTED] Office: VERMONT SERVICE CENTER  
EAC 03 070 52476

Date: JUL 06 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:



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 Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a photo agency. It seeks to employ the beneficiary permanently in the United States as a software developer.<sup>1</sup> As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 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 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 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, 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. 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$70,000.00 per year. The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of a portion of petitioner's Form 1120S U.S. Corporation Income Tax Return, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center on November 18, 2003, requested evidence pertinent to that issue.

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<sup>1</sup> A family based immigration petition has been filed for this beneficiary at Citizenship and Immigration Services file number EAC 01 183 53109.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested: "Submit the 2001 United States federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax return ...."

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted or resubmitted the petitioner's Internal Revenue Service (IRS) Form 1120S tax returns for years 2001 and 2002.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$70,000.00 per year from the priority date.

- In 2001, the Form 1120S stated taxable income<sup>2</sup> of \$16,482.00.
- In 2002, the Form 1120S stated taxable income of \$96,702.00.

The director denied the petition on January 29, 2004, because the petitioner failed to establish its ability to pay the proffered wage in 2001 from either its net income or new current assets.

On appeal, counsel resubmitted the above tax returns, a letter from the petitioner, and the company's W-2 Wage and Tax Statements for 2001 through 2003, a compiled financial statement dated December 31, 2001, and Employee's quarterly wage reports for New York State for 2003.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. The petitioner did not employ the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. Petitioner's net current assets can be considered in the determination of the

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<sup>2</sup> IRS Form 1120S, Line 21.

ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did have taxable income to pay the proffered wage in 2002 for which petitioner's tax returns are offered for evidence.

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.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

Examining the two Form 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets exceeded its current liabilities.

- In 2002, petitioner's Form 1120S return stated current assets of \$71,961.00 and \$8,720.00 in current liabilities. Therefore, the petitioner had \$63,241.00 in net current assets for 2002. Since the proffered wage was \$70,000 per year, this sum is more than the proffered wage.
- In 2001, petitioner's Form 1120S return stated current assets of \$26,842.00 and \$8,720.00 in current liabilities. Therefore, the petitioner had \$18,122.00 in net current assets for 2001. Since the proffered wage was \$70,000 per year, this sum is less than the proffered wage.

Therefore, for the tax year 2001 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets. Petitioner did have sufficient funds to pay the proffered wage in year 2002 from its net income.

Petitioner contends that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date through the addition of assets, deductions such as depreciation, and other funding elements. According to regulation,<sup>4</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. In his calculations, petitioner is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result.

Petitioner's advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate taxable income deficiencies. Counsel asserts that depreciation is a component of to be added to the petitioner's taxable income. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

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<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>4</sup> 8 C.F.R. § 204.5(g)(2), *Supra*.

Plaintiffs also contend that 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 the court should revise these figures by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel advocates including payments for long-term debts specifically mortgage and loans from shareholders as assets that when added to funds included in "other current liabilities" will be available to pay the proffered wage. CIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date but not long term liabilities or capital depreciable assets. The AAO also rejects counsel's argument that the petitioner's net current assets can be added to its net income in order to have sufficient funds to pay the proffered wage. That method double-counts the petitioner's income contrary to the utilization of either the cash-or accrual basis of accounting. The first page of a federal tax return is akin to an income statement that includes the petitioner's net income. The net income is an amount summarizing the petitioner's revenues, costs and expenses over time. The tax statement "Schedule L" reflects assets and liabilities on dates certain during the fiscal year. It is used to compose the final summary presented on the income statements as the net income amount. Therefore, to add these two final dollar amounts together from the two pages of the federal tax return essentially double counts the dollar amounts to distort the true representation of the petitioner's finances.

In an effort to determine how the company would be able to find additional funds, the principal of petitioner examines costs expended by the company for "external support services", "external hosting services," and the salaries of two part time employees who have left the company.<sup>5</sup> Counsel asserts that the beneficiary will replace the workers but their positions were not similar.<sup>6</sup> Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present if the duties performed by the replaced employees differ from the proffered position. Similarly, funds paid for outside services for duties different than the duties of the proffered position cannot be used as funds available to pay the proffered wage.

Proof of ability to pay begins on the priority date, that is April 27, 2001, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, in this instance, no detail or documentation has been provided to explain how the

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<sup>5</sup> The petitioner mentions the elimination of a sales staff position but the elimination related to a change in petitioner's business plans.

<sup>6</sup> The two employees worked "creating web pages." They lacked programming skills in contrast to the proffered position that involved software development and the application of programming skills.

beneficiary's employment as a software developer will significantly increase petitioner's profits. It is speculative to assert that the beneficiary would save costs since he has not been employed to perform the occupation. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. Since the beneficiary was not employed by petition, his contribution to past or future earnings is speculation. The record does not contain evidence of the beneficiary's contribution to petitioner's taxable income, nor, the beneficiary's talent or professional reputation in the occupation that would increase profits. . Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner calculates lost profits that could have been earned but for the employment of the beneficiary. The petitioner cannot utilize expenses, expended funds, or lost profits, as monies available to pay the proffered wage.

The petitioner recounts its intent in 2001 to change its business plan and to produce greater profits. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristic year for the petitioner.

*Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. 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. There were large moving costs and also a period of time when the petitioner was unable to do regular business. 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 couturiere.

Petitioner's financials do not support that it is a successful business with the ability to employ the beneficiary at the proffered wage. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.