



U.S. Citizenship
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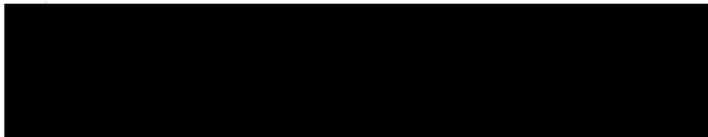
FILE: [REDACTED] Office: VERMONT SERVICE CENTER
EAC 02 192 53417

Date: **JUL 06 2005**

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

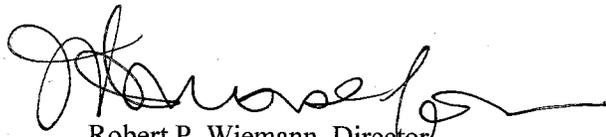
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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, the 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 February 22, 2001. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour (\$29,120.00 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 petitioner's Form 1120 U.S. Corporation Income Tax Return for 2000, 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 December 23, 2002 requested evidence pertinent to that issue.

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 additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$14 per hour (\$29,120 per year) as of February 22, 2001, the date of filing and continuing to the present. We note that your 2000 U.S. Corporation Income Tax Return for the year ending March 31, 2001 shows a loss of \$12,390. It does not appear you had sufficient funds available to pay the beneficiary's salary.

If there is a balance sheet page for your 2000 tax return, please submit it.

If available, submit the 2001 U.S. 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

As an alternative you may submit annual reports for 2001, which are accompanied by, audited or reviewed financial statements.

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 1120 tax returns for years 2000, and 2001 as well as W-2 Wage and Tax Statements for 2000, 2001 and 2002. Petitioner also submitted its regular business checking statements from April 2002 to January 31, 2003.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$29,120.00 per year from the priority date.

- In 2001, the Form 1120 stated taxable income loss of <\$70,813.00>¹.
- In 2000, the Form 1120 stated taxable income loss of <\$12,390.00>.

The director denied the petition on August 12, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts in pertinent part:

The decision of the DHS-BCIS was not based on a comprehensive evaluation of the forms of evidence submitted by the petitioner as described in 8 CFR [§] 204.5(g)(2)

... A fair analysis of the evidence presented by the Petitioner must be made by evaluating the gross receipts of the business for the period beginning with February 22, 2001 through the present date, as well as the net income, the length that the ... [the petitioner] has been a viable business entity, the business climate in 2001, the consistent cash flow and lack of business indebtedness by the ... [the petitioner].

¹ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

On appeal, counsel submits a Form 1099 for 2002, the petitioner's Internal Revenue Service (IRS) Form 1120 tax return for year 2002, and, an affidavit by the business owner.

The tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$29,120.00 per year from the priority date.

- In 2002, the Form 1120 stated taxable income \$16,822.00.

Therefore for the period examined, 2000 to 2002, the petitioner was unable to pay the proffered wage of \$29,120.00 per year from taxable earnings. For this three-year period, petitioner averaged a yearly loss of <\$22,127.00>.

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. In 2000 and 2001, the petitioner paid the beneficiary \$11,400.00 and \$12,480.00 respectively. A Form 1099 submitted for the beneficiary states total compensation paid by petitioner as \$26,240.00 in 2002, and, there is also a Form W-2 submitted that states wages paid of \$13,120.00 in the same year. Thus, since the petitioner paid the beneficiary total wages of \$39,360.00 in 2002 it has established its ability to pay the proffered wage in that year.

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 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 not have enough taxable income to pay the proffered wage at any time between the years 2000 through 2002 for which petitioner's tax returns are offered for evidence.

- In 2002, the Form 1120 stated taxable income \$16,822.00. The petitioner paid wages of \$39,360.00 to the beneficiary. Petitioner had the ability to pay the beneficiary the proffered wage in 2002 by combining these two amounts.

- In 2001, the Form 1120 stated taxable income loss of <\$70,813.00>. The petitioner paid wages of \$12,480.00 to the beneficiary. Petitioner did not have the ability to pay the beneficiary the proffered wage in 2001 by combining these two sums.
- In 2000, the Form 1120 stated taxable income loss of <\$12,390.00>. The petitioner paid wages of \$11,400.00 to the beneficiary. Petitioner did not have the ability to pay the beneficiary the proffered wage in 2000 by combining these two sums.

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.² 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 three Form 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets never exceeded its net current liabilities in 2000 and 2001.

- In 2002, petitioner's Form 1120 return stated current assets of \$59,050.00 and \$42,303.00 in current liabilities. Therefore, the petitioner had \$16,747.00 in current net assets for 2002. Since the proffered wage was \$29,120.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of \$24,910.00 and \$47,125.00 in current liabilities. Therefore, the petitioner had a <\$22,215.00> in current net assets for 2001. Since the proffered wage was \$29,120.00 per year, this sum is less than the proffered wage.
- In 2000, petitioner's Form 1120 return stated current assets of \$12,953.00 and \$53,527.00 in current liabilities. Therefore, the petitioner had a <\$39,574.00> in current net assets for 2000. Since the proffered wage was \$29,120.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2000 through 2002 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 current net assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel asserts that "[Citizenship and Immigration Services must] ... satisfy the substantial evidence test, and [its determinations] must be made using "such relevant evidence as a reasonable mind might accept to support a conclusion." According to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Matter of Sonogawa, 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 *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

³ 8 C.F.R. § 204.5(g)(2), *Supra*.

\$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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the three-year period evidenced by the three tax returns was an uncharacteristically unprofitable year for the petitioner. Counsel's statement that the petitioner is a viable business is refuted by petitioner's own sworn statement that there "...was a considerable operating loss for the year immediately following the filing of the application for Alien Labor Certification. ..." as found in his affidavit in the record of proceeding. As stated above, the petitioner for the three years examined, 2000 through 2003 suffered an income loss of an average of <\$22,127.00> each year.

Counsel has presented petitioner's regular business checking statements from April 2002 to January 31, 2003. Petitioner explains why it submitted the statements:

The average monthly cash flow for this period is \$36,514. The average running balance in this account is \$8539 per month. Total assets for 2000 equaled \$54,298 [and] for 2001 \$60,121 and for 2002 \$101,92. Despite a considerable operating loss for the year immediately following the filing of the application for Alien Labor Certification ...the fiscal year beginning one month after the priority date of February 22, 2001, ... [the petitioner] has rebounded.

The petitioner is including in his estimation of "total assets" depreciation that is taken as a deduction to determine taxable income. Petitioner advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against petitioner'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:

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.

Further counsel's reliance on the balances in the petitioner's bank account to prove the ability to pay is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 return, such as the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.