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U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 216 51900 Office: VERMONT SERVICE CENTER Date: MAR 10 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other Worker 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 poultry products firm. It seeks to employ the beneficiary permanently in the United States as a poultry dresser. 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 12, 2001. The proffered wage as stated on the Form ETA 750 is \$13.30, which amounts to \$27,664 per annum. On the Form ETA 750B, signed by the beneficiary on March 8, 2001, the beneficiary claims to have worked for the petitioner since 1997.

On Part 5 of the visa petition, the petitioner claims to have been established in 1936 and to currently employ three workers. In support of its ability to pay the beneficiary's proposed wage offer of \$27,664 per year, the petitioner initially submitted a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001. It shows that the petitioner paid the beneficiary \$13,077.40 in wages that year. An accountant's letter, dated April 23, 2002,

accompanies these submissions. It indicates that the petitioner's 2001 tax return had not been filed yet, but that a preliminary review suggests that the petitioner has the ability to pay the certified wage.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On March 10, 2003, the director instructed the petitioner to submit additional evidence of its ability to pay the proffered salary beginning on the priority date and continuing until the present. Consistent with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that such evidence should be annual reports, audited financial statements or federal tax returns. The director further instructed the petitioner that it could provide its 2000 and 2001 federal tax returns, copies of the beneficiary's W-2s for 2000, 2001, and 2002, or annual reports for 2001 accompanied by audited or reviewed financial statements.

In response, the petitioner, through counsel, provided copies of the petitioner's payroll record showing the wages paid to the beneficiary from January 27, 2003 to March 24, 2003. They indicate that the petitioner was paying the beneficiary a salary equal to the proffered wage during that period.

The director discussed the 2003 level of wages paid to the beneficiary, as well as the beneficiary's 2001 W-2, but concluded that this evidence did not establish that petitioner had the continuing ability to pay the proffered wage as of the priority date of March 12, 2001.

On appeal, counsel resubmitted a copy of the beneficiary's 2001 W-2. Counsel also provided copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and 2002. The contain the following information:

| | 2001 | 2002 |
|--------------------------------|-----------|-----------|
| Net income | \$ 8,853 | \$33,513 |
| Current assets (Sched. L) | \$ 4,400 | \$ 8,411 |
| Current liabilities (Sched. L) | \$44,795 | \$16,727 |
| Net current assets | -\$40,395 | -\$ 8,316 |

As set forth above, net current assets are the difference between the petitioner's current assets and current liabilities.¹ Besides net income, CIS will review a petitioner's net current assets as an alternative method of determining its ability to pay a certified wage. A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. 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 out of those net current assets.

Counsel asserts on appeal that various amounts shown on its 2001 tax return such as the value of its year-end inventory, cash, depreciation expense, and outside services deduction should be added back to the petitioner's net income in order to determine its ability to pay the proposed wage offer of \$27,664.

¹ 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.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the difference between the proffered wage of \$27,664 and beneficiary's actual 2001 wages of \$13,077.40 resulted in a shortfall of \$14,586.60.

If a petitioner may not have employed a beneficiary at a wage equal to the proffered salary, CIS will next 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Counsel's argument that the expenses such as depreciation deducted on the tax return may be added back to a petitioner's net income is not persuasive in this case. 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. The court in *Chi-Feng Chang* further 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 these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

It is further noted that counsel's contention that a deduction of \$2,993 for "outside services" "could have been offset" does not present any specific rationale why such an amount should be added back to the petitioner's net income. Counsel's assertion in this regard does not constitute evidence and is not persuasive. See *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In this case, the difference between the proffered wage of \$27,664 and beneficiary's actual 2001 wages of \$13,077.40 resulted in a shortfall of \$14,586.60. This amount could not be paid by the petitioner's reported net

income of \$8,853. As mentioned above, CIS will also review the petitioner's net current assets. We reject, however, counsel's argument that the petitioner's current assets reflected on Schedule L such as the value of inventory or cash should be viewed as isolated assets to be added to income. In order to properly evaluate a petitioner's ability to pay a proposed wage offer, current assets must be balanced by a petitioner's current liabilities, with the total represented as a petitioner's *net current assets*. As set forth above, in 2001, the petitioner's net current assets of -\$40,395 could not cover the shortfall of \$14,586.60 between the proffered wage and the beneficiary's actual wages paid.

As shown by the record, while the petitioner's 2002 tax return shows that it reported sufficient net income to cover the proffered wage, in 2001, neither its net income of \$8,853, nor its net current assets of -\$40,395 demonstrated sufficient resources to pay the \$14,586.60 difference between the proffered wage and the actual wages paid to the beneficiary. As the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate a continuing ability to pay a proffered wage beginning at the priority date, the evidence in this case fails to show this ability as of the priority date of March 12, 2001.

Citing *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), counsel also asserts that the petitioner's financial data supports its future prospects for success and establishes its ability to pay the proffered wage. In *Matter of Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. 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 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, two tax returns submitted on appeal do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa* and which overcome the evidence contained in the record.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered 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.