



U.S. Citizenship  
and Immigration  
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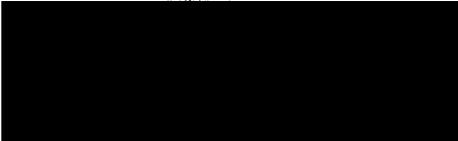
FILE: [REDACTED] Office: VERMONT SERVICE CENTER  
EAC 03 007 53309

MAY 13 2005  
Date:

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:



PUBLIC COPY

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

The petitioner is a tile installation firm. It seeks to employ the beneficiary permanently in the United States as a tile setter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 wage.

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 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 DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 10, 2001. The proffered wage as stated on the Form ETA 750 is \$24.46 per hour, which amounts to \$50,876.80 annually. The ETA 750B, signed by the alien beneficiary on January 29, 2001, does not indicate that the petitioner has employed the beneficiary.

As evidence of its continuing financial ability to pay the certified wage of \$50,876.80 per year, the petitioner initially submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. It reflects that the petitioner uses a standard calendar year to file its taxes. On this return, the petitioner reported ordinary income of -\$12,144. Schedule L of the tax return shows that the petitioner had \$17,361 in current assets and \$1,491 in current liabilities, resulting in \$15,870 in net current assets. Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will also examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> It

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<sup>1</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's year-end net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence on June 11, 2003. The director instructed the petitioner to supply more documentation of its ability to pay the proffered salary as of the priority date and continuing to the present. The director also advised the petitioner to provide a copy of its 2002 tax return or a 2002 annual report. She further requested that the petitioner also submit copies of the beneficiary's Wage and Tax Statements (W-2s) for 2001 and 2002 if it employed the beneficiary during this period.

In response, the petitioner, through counsel, provided a copy of its 2002 federal tax return. It reveals that the petitioner declared ordinary income of -\$4,673. Schedule L shows that the petitioner had \$23,585 in current assets and \$19,245 in current liabilities, yielding \$4,340 in net current assets.

Counsel also submitted copies of the petitioner's business checking account statements from Chase Bank for 2001 and 2002, as well as a copy of an unaudited financial statement for 2001. A transmittal letter from counsel's office indicates that the petitioner was established in 1998 and has two full-time employees.

The director denied the petition on October 20, 2003. The director cited the petitioner's net income and net current assets reflected on the petitioner's 2001 and 2002 tax returns, and concluded that they did not support the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director also observed that five of the petitioner's bank statements showed ending balances less than an amount needed to cover the alien's projected monthly wage.

On appeal, counsel provides additional copies of the petitioner's checking account statements covering a period from January to November 2003. Counsel initially suggests that Citizenship and Immigration Services (CIS) is precluded from reviewing the petitioner's ability to pay the proffered wage because the Department of Labor has approved the petitioner's application for labor certification. Counsel's contention is not persuasive. The financial viability of the employer to pay the certified wage is well within the province of CIS to investigate. As stated by the court in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (citing *Ubeda v. Palmer*, 539 F.Supp. 647, 649-650 (N.D. Ill. 1982), *aff'd mem.*, 703 F.2d 571 (7th Cir. 1983):

In *Ubeda v. Palmer* [citation omitted] the court concluded that the determination of a petitioning employer's financial viability is one to be made solely by the [CIS] and not the Secretary of Labor. In view of the agencies' current practice, which is given weight in determining the proper division of functions between the [CIS] and the DOL, *see Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983), we conclude likewise. . .

Counsel asserts that the director erred in her reliance upon the information revealed by the petitioner's corporate tax returns. The AAO does not agree. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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 evidence in the instant matter does not suggest that the petitioner has employed the alien, although counsel asserts on appeal that the beneficiary has worked for the petitioner as a tile setter since 1998. As set forth above, the beneficiary failed to mention any employment by the petitioner in the ETA 750B, which he signed on January 29, 2001. Moreover, despite being instructed to submit copies of any W-2s that may have been issued to the beneficiary if he worked for the petitioner during 2001 or 2002, the petitioner's response did not include any documentation or suggestion that this was the case. Counsel's assertions in this regard cannot be considered as evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

CIS will also 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*, *supra*; 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)). 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.

In this case, as stated above, the 2001 corporate tax return shows that the petitioner reported -\$12,144 as net income. This is far short of the amount needed to pay a certified wage of \$50,876.80. Its net current assets of \$15,870 were also \$35,006.80 less than the sum needed to cover the proposed wage offer.

Similarly, in 2002, neither the petitioner's net income of -\$4,673, nor its net current assets of \$4,340 was sufficient to pay the proffered salary.

Counsel criticizes the director's observation that the one of the petitioner's bank statements contained a negative balance and cites the additional bank statements submitted on appeal to show the petitioner's growth potential and ability to pay the proffered wage.

It is noted that 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 persuasively demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. The regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports, audited financial statements or federal tax returns. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to the underlying record to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

In the context of the financial information contained in the record, counsel maintains that the petitioner's situation is similar to that described in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) where it was determined that 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 *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, as noted above, the tax returns contained in the record do not represent a framework of profitable years analogous to the *Sonegawa* petitioner. Here, the petitioner's net income, as set forth in its corporate tax returns, reflects losses in both 2001 and 2002, accompanied by increasingly modest figures representing its net current assets. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the evidence and argument presented on appeal, the AAO concludes that the petitioner has not sufficiently demonstrated its continuing ability to pay the proffered wage beginning on the visa priority date.

Beyond the decision of the director, it is noted that the approved labor certification requires that an applicant for the certified position of tile setter must have two years of employment experience in the job offered. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) provides that a claim of such experience must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. It is noted that the record in this case contains no corroborative documentation from any previous employer(s) certifying that the beneficiary has met the required terms of the approved labor certification.

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.