



U.S. Citizenship
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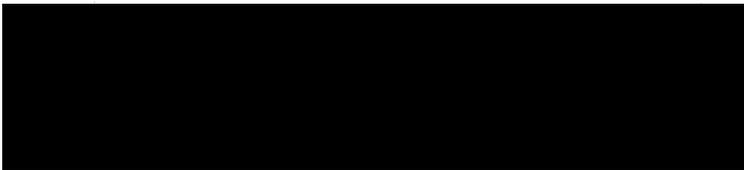
IN RE:

Petitioner:

Beneficiary:

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 Acting Director, Vermont 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$27,393.60 year.

On the petition, the petitioner stated that it was established during 1992 and that it employs three workers. The petition states that the petitioner's gross annual income is \$237,843 and that its net annual income is also \$237,843.¹ 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 will employ the beneficiary [REDACTED]

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared ordinary income of \$4,065 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$24,303 and current liabilities of \$10,409, which yields net current assets of \$13,894.

¹ Reference to the petitioner's 2001 tax return shows that this number is the petitioner's gross receipt during that year.

Because 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 July 2, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center specifically requested the petitioner's 2002 Federal income tax return. The Service Center also specifically requested that, if the petitioner had employed the beneficiary during 2001 and 2002, it provide Form W-2 Wage and Tax Statements or Form 1099 Miscellaneous Income statements showing amounts it paid him during those years. Finally, the Service Center asked whether the proffered position is an existing position or a newly created position.

In response, counsel submitted no W-2 forms showing wages paid to the beneficiary. Counsel returned a copy of the Request for Evidence. In answer to the question, "Will the prospective employee fill a newly created position?" the handwritten answer "Yes" appears on that Request for Evidence.

Counsel also submitted the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, and the petitioner's owners' 2001 Form 1040 U.S. Individual Income Tax Return, including Form W-2 Wage and Tax Statements showing amounts the petitioner paid to the petitioner's owners.

Finally, counsel submitted a cover letter, dated September 24, 2003. In that letter counsel argued that the petitioner's gross receipts; its deductions, including its depreciation deduction; its current assets, including cash on hand; and its compensation of officers; together demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Counsel referred to the petitioner's owners' adjusted gross income, as shown at Line 33 on the Form 1040 U.S. Individual Income Tax Return, as the petitioner's net profit. Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that, under these circumstances, the petition should be approved.

The petitioner's 2002 tax return shows that the petitioner declared ordinary income of \$7,188 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$20,880 and current liabilities of \$13,080, which yields net current assets of \$7,800.

The Acting 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 March 9, 2004, denied the petition.

On appeal counsel argues that the petitioner's gross receipts, total assets,² ordinary income, and its owners' income and assets are all indices of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel again urges that *Matter of Sonogawa*, *supra*, mandates approval of the instant petition. Finally, counsel urges that because the petitioner is a subchapter S corporation, which is a pass-through entity, the petitioner's owners' income and assets should be included in the computation of funds available to the petitioner to pay the proffered wage.

² Counsel mischaracterizes the petitioner's Line E Total Assets, first, as its "retained asset base," and, second, as its "total current asset." [Sic] The petitioner's total assets are not available to pay the proffered wage, for reasons explained below. The computation of the petitioner's current assets, current liabilities, and net current assets is also described below.

With the appeal, counsel submits statements of the petitioner's owners' investment and bank accounts, photocopies of checks drawn on the personal bank account of the petitioner's owners' 2001 W-2 forms showing amounts paid to the owners, and the petitioner's own bank account statements.

Counsel's reliance on the petitioner's bank statements 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 it 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.³ 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 reported on its tax returns.

The bank and investment accounts of the petitioner's owners are even less relevant to the petitioner's ability to pay the proffered wage. The petitioner is a corporation. A corporation, whether a subchapter C corporation or a subchapter S corporation, is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980)

That the petitioner is a subchapter S corporation, a pass-through entity, means that various types of income passed through to the owner or owners of a subchapter S corporation retain their character and are taxed differently when declared by the owner or owners. It does not mean that the owner or owners of the corporation are obliged to pay the debts and obligations of the corporation out of their own income and assets, except to the extent of their capital contribution to the corporation. The income and assets of the petitioner's owners is not necessarily available to the petitioner to pay wages.⁴ Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). This office shall not consider the petitioner's owners' income and assets further.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the

³ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁴ That is, the petitioner's owners' income and assets are available to the petitioner only to the extent that they choose to make them available.

value lost as equipment and buildings deteriorate 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's citation of *Matter of Sonogawa, supra*, is unconvincing. [REDACTED] relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity in *Sonogawa* 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 *Sonogawa*, 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 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 *Sonogawa* 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 evidence does not indicate that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel urges that the petitioner's gross receipts and the size of its deductions are an index of its ability to pay the proffered wage. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Showing that it claimed large deductions is also insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁵ or otherwise increased its net income,⁶ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the

⁵ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁶ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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 CIS should have considered income before expenses were paid rather than net income.

Counsel argues that the petitioner's Form 1120S, Line 7, Compensation of Officers is also a fund that was available to pay additional wages. Counsel implies that the petitioner need not have paid that amount to its officers, but that the petitioner could have retained it to pay the proffered wage. Counsel provides no evidence, however, to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

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 a given 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).

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,⁷ in the determination of the petitioner's ability to pay the proffered wage.

⁷ In the case of taxpayer reporting taxes on a Form 1120S, U.S. Income Tax Return for an S Corporation, year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$27,393.60. The priority date is April 30, 2001.

During 2001 the petitioner declared ordinary income of \$4,065. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$13,894. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to the petitioner during 2001 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$7,188. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$7,800. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to the petitioner during 2002 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. 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.