

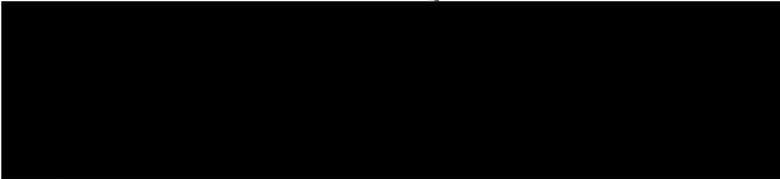


U.S. Citizenship
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File: WAC-03-078-52937 Office: VERMONT SERVICE CENTER Date: NOV 11 2005

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)

IN 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 Director, Vermont Service Center, denied the immigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The AAO is reopening these proceedings on its own motion and will adjudicate the substance of the petitioner's prior motion to reconsider. The motion to reconsider is granted. The AAO's decision is withdrawn and the appeal is sustained. The petition is approved.

The petitioner is a fire protection system. It seeks to employ the beneficiary permanently in the United States as a plumbing drafter. 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. The AAO affirmed the director's decision.

On motion, 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 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$3,500 per month, which amounts to \$42,000 per year. On the Form ETA 750B, signed by the beneficiary on January 10, 1998, the beneficiary did not claim to have worked for the petitioner.

The director determined that the petitioner failed to establish its continuing ability to pay the proffered wage because its net income and net current assets, as reported on its corporate tax returns, were both below the amount of the proffered wage. On appeal, counsel relied upon two expert opinions, one from [REDACTED] who referenced increasing loans to shareholders, depreciation, the petitioner's intent to replace outside contractors with a permanent employee, and a pattern of growth and expanding staff as indicators of the petitioner's continuing ability to pay the proffered wage. The other expert opinion, from [REDACTED] is the petitioner's certified public accountant, who described the petitioner's steady growth and expansion of staff and that hiring the beneficiary would increase the petitioner's profitability. Counsel also submitted a statement from the petitioner's management who stated that the petitioner is spending too much on outside contractors and could cut costs by hiring a drafter.

The AAO dismissed the appeal on June 3, 2005 affirming the director's determination that the petitioner's net income and net current assets were insufficient to establish its continuing ability to pay the difference between

wages paid to the beneficiary in her capacity as an independent contractor for the petitioner and the proffered wage beginning on the priority date¹. The AAO also referenced the letters by [REDACTED] and [REDACTED] and stated that their contentions that replacing independent contractors with the beneficiary would be more convincing if “the petitioner had documented the position, duties, wages and termination of the unidentified worker who performed the proffered position.” The AAO conceded that the petitioner established its ability to pay the difference between wages paid to the beneficiary and the proffered wage in 1998 and 2001, but did not find that the petitioner established its ability to pay the difference between wages paid to the beneficiary and the proffered wage in 1999 or 2000. The AAO also applied *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relied upon by counsel, to the petitioner’s case and did not find analogous circumstances.

On motion to reopen and reconsider, counsel states that the AAO and the director err by relying upon arbitrary figures in tax returns that fail to adhere to “generally accepted accounting principles and the *Sonogawa* standard.”

¹ 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 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 AAO also notes upon review that the first adjudicator from this office properly relied upon precedent for using the petitioner’s net income in the analysis, contrary to counsel’s motion assertions that “arbitrary numbers” were manipulated to produce a negative result. If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, 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). Reliance on the petitioner’s gross receipts and wage expense is misplaced. Showing that the petitioner’s gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 the 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.

(Emphasis in original.) *Chi-Feng* at 537.

Counsel also states that the AAO failed to consider the expert opinions provided by [REDACTED] and [REDACTED]. Counsel asserts that the totality of circumstances shift the weight of evidence in the favor of granting the petition.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Since an assertion is made that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision, the motion qualifies for consideration as a motion to reconsider.

On review, the AAO overturns its prior decision based on the totality of circumstances demonstrated in this case². The proffered wage is \$42,000 per year. The petitioner's ability to pay the proffered wage is not in dispute for 1998 and 2001. Thus, on review, the AAO will only examine 1999 and 2000. According to evidence submitted on motion, in 2000, the petitioner paid the beneficiary \$43,212.91³, which is greater than the proffered wage, and thus establishes the petitioner's *prima facie* ability to pay the proffered wage in that year. The record of proceeding does not contain evidence of wages paid to the beneficiary in 1999, but the first AAO adjudicator indicated that the petitioner needed an additional \$6,116 to pay the proffered wage in 1999. The sum \$6,116 is the difference between the proffered wage and the petitioner's 1999 net income. That amount is nominal considering the totality of circumstances in this case and the petitioner's demonstration of its ability to pay the proffered wage in every other relevant year. The petitioner had gross revenues of over \$4 million in 1999 and paid wages of approximately \$500,000 in that year. Counsel's argument concerning the petitioner's size, longevity, and number of employees cannot be overlooked, since the petitioner has been in business since 1987 and has steadily increased its workforce. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. at 612. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

Based on the limited and unique facts of this case, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The motion to reopen and reconsider is granted. The AAO's decision of June 3, 2005 is withdrawn. The appeal is sustained. The petition is approved.

² However, the AAO does not concur with counsel that the AAO used arbitrary figures from the petitioner's tax returns or failed to discuss the expert opinion's letters. The AAO's prior decision properly relies upon precedent, policy, and discusses all evidentiary submissions contained in the record of proceeding.

³ The Form 1099, Miscellaneous Income, submitted on appeal, for 2000 is evidence of wages paid to the beneficiary, in her capacity as an independent contractor, for that year.