



U.S. Citizenship
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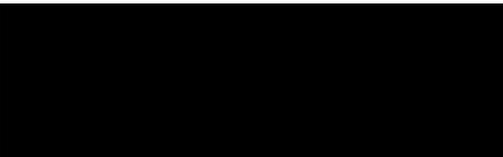


FILE: LIN 04 136 51683 Office: NEBRASKA SERVICE CENTER Date: **NOV 18 2005**

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

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

The petitioner is a restaurant specializing in Chinese cuisine. 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 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 regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either 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 that 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 petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is May 22, 2001. The proffered wage as stated on the Form ETA 750 is \$22,000 annually. On the Form ETA 750B, signed by the beneficiary on May 4, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on April 4, 2004. On the petition, the petitioner did not state when it was established, how many employees it currently had, its gross annual income or its net annual income.

In support of the petition, the petitioner submitted:

- Counsel's G-28;
- An approved ETA 750;
- Copies of the petitioner's Form 1040's for 2001-2003
- Copies of the petitioner's unaudited balance sheets for 2001-2003; and,
- Copies of the petitioner's bank statements for March 2002-March 2003.

In a request for evidence (RFE) dated May 18, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also specifically requested bank statements for 2002, and documentation showing how the petitioner would pay for his own family household expenses.

In response to the RFE, the petitioner on June 4, 2004, submitted:

- The May 4, 2004 Interoffice Memorandum of William R. Yates, Associate CIS Director for Operations entitled, "Determination of Ability to Pay Under 8 C.F.R.204.5 (g)(2);"
- A June 1, 2004 letter of a CPA suggesting that adding back depreciation deductions to the petitioner's adjusted gross income would give the petitioner the ability to pay the proffered wage;
- Bank statements from the petitioner's business account showing average monthly balances from March 2003 to March 2004; and,
- The petitioner's year-end balance sheets for 2001-2003.

In a decision dated June 22, 2004, the director determined that the evidence did not demonstrate that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence that included:

- A July 6, 2004 letter from the CPA stating that the director erred in concluding that the petitioner's net current assets would have totaled \$130,398.50 for 2001, \$96,530.77 for 2002, and \$117,238.61 for 2003, had CIS taken fixed assets into account.
- Monthly business account bank statements from the priority date (May 22, 2001) through June 2004, showing the steady growth of average monthly balances from \$17,457.39 to \$50,772.85 in June 2004.

Counsel states on appeal that CIS should take into account the petitioner's fixed assets in balance sheets, and monthly balances in bank statements, to determine an employer's ability to pay the proffered wage. Further, counsel asserts that there are other measures of an employer's ability to pay the proffered wage besides annual net income, including net current assets and wages an employer is already paying the beneficiary. He also cites *Matter of Sonogawa*, 12 I & N Dec. 612 (BIA 1967), to say that a company with a long history of profitability can establish the reasonable expectation of a company's "continued increase in business" to show it could pay the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document that has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, the director did not specifically request the documents submitted on appeal.¹ Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, *supra*.

¹ Because the RFE only sought bank statements for 2002, bank statements submitted on appeal will be deemed timely.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. The record of proceeding indicates that at the filing of the petition, the beneficiary had not started at the proffered position.

CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Contrary to counsel's assertions, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax returns each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of five, including himself. In 2001, the sole proprietorship's adjusted gross income of \$17,002 does not cover the proffered wage of \$22,000. It is improbable that the sole proprietor could support himself and his family for an entire year without some additional income.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The owner's tax returns show the following amounts for adjusted gross income:

Tax Year	Adjusted Gross Income	Wage Increase Needed To Pay Proffered Wage	Surplus or (Deficit)
2001	\$17,002	\$22,000	(\$4,998)

2002	\$11,401	\$22,000	(\$10,599)
2003	\$23,287	\$22,000	\$1,287

Since two of the three calculations result in negative numbers, the petitioner's net income fails to demonstrate the petitioner's ability to pay the proffered wage continuously from the priority date forward.

The record also contains copies of unaudited financial statements, such as the mentioned balance sheets. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns.

It is noted that the petitioner's monthly bank statements showed consistent growth over the two years from \$17,457.39 at the end of June 2001 to \$50,772.85 at the end of June 2004. Two years of growth, however, does not compare with the company employer in *Matter of Sonogawa*, where it had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. By contrast, the petitioner's adjusted gross income did not show a constant increase in the two years under review but instead, fluctuated, dropping and then rising. In the year of filing the petition, the petitioner changed business locations and paid rent on both the old and new locations for five months. In *Matter of Sonogawa*, there were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

Counsel cites non-precedent decisions of the AAO. It is noted that neither AAO decision contains facts that are apposite those of the instant case. One of the cited decisions examines an employer's net current assets. Here, counsel has listed the petitioner's total assets, which play no part in the computation of net current assets.² In any

² Net current assets are the difference between the petitioner's current assets and current liabilities. According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" generally have a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations generally

event, the record lacks the information for determining the petitioner's net current assets. The beneficiary in the other case counsel cites was earning wages from the employer. The record in the instant proceeding shows the beneficiary does not work for the petitioner. Moreover, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.

payable within one year, such accounts payable, short-term notes payable, and accrued expenses, such as taxes and salaries. Counsel's assertion that the petitioner's total assets belong in the determination of the company's ability to pay the proffered wage is not persuasive, because "total assets" include depreciable assets that would not ordinarily be converted to cash, and thus not available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities.