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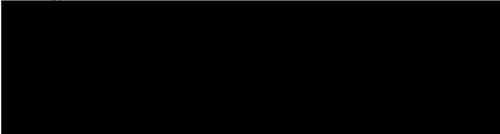
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FILE: EAC 03 074 52468 Office: VERMONT SERVICE CENTER Date: SEP 30 2005

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

The petitioner is a landscape design firm. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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.

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 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) 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 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 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$16.18 per hour, which amounts to \$29,447.60 annually, based on the 35-hour workweek specified on the ETA 750B. The beneficiary signed the form on October 30, 2000, and did not claim he was working for the petitioner.

The I-140 petition was submitted on December 12, 2002. On the petition, the petitioner claimed to have been established on April 1, 1996, to have a gross annual income of \$1 million, but left the petition blank in the sections that asked about its current number of employees and its net annual income.

In support of the petition, the petitioner submitted:

- A Form G-28 appointing counsel;
- An original certified Form ETA 750;
- A 1998 Form 1120S tax return listing \$21,088 in ordinary income on line 21; and,
- Two letters from former clients of the beneficiary as well as the beneficiary's unsworn statement describing his work methods.

In a request for evidence (RFE) dated November 12, 2003, 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, financial statements, but also sought “bank account records or personnel records,” to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also specifically requested any 1998 Form W-2 Wage and Tax Statements issued to the beneficiary.

In response to the RFE, counsel on December 1, 2003, wrote that the previously submitted Form 1120S demonstrated the petitioner’s ability to pay the proffered wage, suggesting that Schedule L showed “the net cash position at the beginning of 1998 was far in excess of the necessary amount,” with \$59,415 cash and “only \$27 in current liabilities.” The letter further asserted that the director’s ability to pay policy was that “depreciation can generally be considered with taxable income in evaluating the ability to pay an additional employee.” The letter described depreciation as a “‘paper’ deduction, which does not affect cash flow income. The available funds were therefore \$21,088 plus \$13,791 [depreciation] or \$34,879, which exceeds the offered salary.”

In a decision dated April 20, 2004, the director determined that the evidence did not establish 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. The director pointed to the 1998 Schedule L’s \$1,611 current assets (\$600 ending cash balance, \$1,011 other current assets), which contrasts with the \$59,415 listed on Schedule L as the beginning-of-the-year cash balance. The director also referred to the petitioner’s ordinary income of \$21,088, not, as counsel had, to ordinary income and depreciation combined.

On appeal, counsel submits a brief and additional evidence in the form of on-line literature about the company and its principal designer. Counsel states on appeal that the director’s decision “completely ignores” counsel’s December 1, 2003 response to the RFE, and so repeated those assertions in the brief.

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*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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. The beneficiary did not claim to have worked for the petitioner.

As another means of determining the petitioner’s ability to pay the proffered wage, 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. As noted, the petitioner's ordinary income of \$21,088, listed on its 1998 income tax return, was less than the \$33,654 proffered wage and fails to establish the petitioner's ability to pay the proffered wage.

Contrary to counsel's assertion, 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. Counsel refers to a summary of how the Vermont Service Center may add depreciation deductions to taxable income in determining ability to pay the proffered wage. Counsel cites a November 16, 1994 American Immigration Lawyers Association teleconference in which the service center director was observing how his office determines a petitioner's financial ability, including through adding back to taxable income, certain of the depreciation deductions taken off gross income for determining taxable income. The director observed that depreciation "can generally be considered with taxable income in evaluating the ability to pay the additional employee."¹ However, a May 4, 2004 Financial Ability Memo of William Yates, issued in anticipation of proposed amendments to 8 C.F.R. § 204.5(g)(2), lists other ways a petitioner may establish ability to pay that do not include adding back depreciation. The traditional policy of CIS, the memo continues, "does not look at depreciation unless the petitioner can identify the actual cash equivalent of the depreciated amount. Petitioners should include this additional material in their analysis of financial ability where depreciation is used."

Accordingly, counsel's assertions are based on speculation about CIS' willingness to consider evidence that a petitioner's equipment has not lost its value as fast as it can deduct its value on its income tax return. The May 4, 2004 Yates memo on financial ability remains the decisive standard for determining a petitioner's ability to pay, based upon its net income, its net current assets, or its current employment of the beneficiary at the proffered wage.

For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. As previously stated, the petitioner's tax return reports that the petitioner earned \$21,088 in ordinary income. Since that figure is less than the proffered wage, the petitioner's ordinary income fails to establish its ability to pay the proffered wage.

And finally, as another means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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. Net current assets are those the petitioner might convert to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

¹ 29 Interpreter Releases 961 (July 26, 2004).

Tax Year	Net Current Assets	Wage increase needed To Pay The Proffered Wage
1998	\$1,518	\$29,447.60 + \$1,518

Since each of those figures is less than the proffered wage, they also fail to establish the ability of the petitioner to pay the proffered wage.

While counsel does not propose reducing the compensation of the petitioner's owner's to be able to pay the proffered wage, the petitioner's 1998 return indicates officer compensation is a relatively sizeable sum, such that in 1998 the petitioner paid the owner \$99,387 in officer compensation. However, before this office will consider such a tradeoff between an officer and an employee, here are some preliminary factors that need to be present in non-personal services cases for this office to apply a *Sonegawa* analysis:

- The petitioner or counsel must actually make the argument that the compensation of officers is discretionary.
- Officer compensation must be greater (preferably vastly greater) than the proffered wage in all of the pertinent years.
- The amount of officer compensation should vary from year to year, demonstrating no contractually fixed amount of officer's pay.
- The officer receiving the compensation must be the sole owner/stockholder or majority owner/stockholder, such that the officer possessed discretion to set his or her own compensation.
- The totality of the circumstances (i.e., other information in the record) supports the fact that the petitioner is a viable, profitable enterprise. This includes all of the usual *Sonegawa* factors: longevity, number of employees, reputation etc.

From the foregoing, we conclude that officer compensation should not be treated as funds for paying the proffered wage.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered 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.