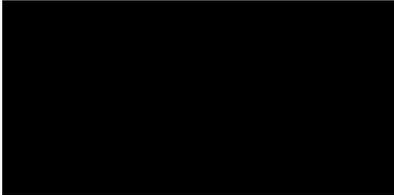




U.S. Citizenship
and Immigration
Services

identifying information used to
prevent clear and unambiguous
invasion of personal privacy

PUBLIC COPY



B6

FILE: [REDACTED]
EAC 03 220 55243

Office: VERMONT DIRECTOR

Date: **OCT 19 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)

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

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage. The director denied the petition accordingly.

On appeal, the 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$11.84.00 per hour (\$24,627.20 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of IRS Form 1120S tax returns for 2001 and 2002, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director specifically requested the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid if employed by petitioner. Additional evidence to prove that the petitioner had the ability to pay the proffered wage was also requested: Employers Quarterly

Federal Tax Form statements (Form-941) for all of 2001 and the first quarter of 2002; Form W-3 which is employer's Transmittal of Wage and Tax Statements for year 2001; and, Form 1096, Annual Summary, and, Transmittal of United States Information Return (if Forms 1099-MISC were issued by the petitioner in 2001).

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted copies of the beneficiary's United States federal tax return 1040EZ for years 2001 and 2002 with W-2 attachments, a copy of Form 1120S tax return for 2001 and 2002, and, the W-3 and 941 Form statements as requested, as well as other documents.

The director denied the petition on April 12, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the director failed to address the evidence of the Form W-2 Wage and Tax Statements since the beneficiary had been employed by the petitioner since 2001, and, there were "add-backs"¹ found in the tax returns submitted that the Director did not take into account such as depreciation. After the appeal was filed, a letter from the owner of [REDACTED] dated June 14, 2004, was submitted.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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 Director found no evidence was submitted to show that the petitioner employed the beneficiary. Although there are W-2 Wage and Tax Statements in the record of proceeding, none were issued to the beneficiary by the petitioner. As is explained in the footnote below, according to the company owner, the petitioner is the parent corporation of other commonly owned companies although the identities of all companies were not disclosed. It does not appear from the evidence that the petitioner is reporting its income on a consolidated basis that is presenting all the assets and liabilities of the parent and its subsidiaries together on one statement or tax return. 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Reconciling information from the owner's letter dated June 14, 2004, the record of proceeding, and the W-2 statements, the petitioner is one of five similar bakery corporations under common ownership. According to the W-2 information, the beneficiary was employed at Brace Road Donuts Inc., in Cherry Hill New Jersey, and at Radha Donut Corporation in Bellmawr, New Jersey in 2001, and, at Radha Donut Corporation again in 2002. The Nilkanth Donut Corporation is located in Glendora, New Jersey. All of the three corporations have individual Federal Employer Identification Numbers. According to the owner's letter, the Nilkanth Donut Corporation is the parent corporation and other corporations are its subsidiaries. There was no evidence

¹ Counsel and petitioner make note of a one-time expense for repair that they assert should be considered as an addition to, and not a deduction from, petitioner's taxable income for 2001. However, since this expense was not documented, it cannot not be considered in evidence. Expense deductions generally cannot be considered as assets, and, even if allowed in this case, the addition of the expense item of \$14,000 to the stated taxable income loss of \$109,944.00 for year 2001, would not have improved petitioner's profitability appreciably.

submitted that the petitioner paid taxes on a consolidated basis with other companies, or that other corporations passed through their profits and losses to the petitioner to report. On the contrary, the weight of the evidence shows that the petitioner is a separate entity with the legal obligation to employ and pay the beneficiary the proffered wage from the priority date.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns submitted demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,627.20 per year from the priority date of April 17, 2001:

- In 2001, the Form 1120S return stated a taxable income loss² of <\$109,944.00>.³
- In 2002, the Form 1120S return stated a taxable income loss of <\$14,216.00>.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2002 for which the petitioner's tax returns are offered for evidence.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

² IRS Form 1120S, Line 21.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

Examining the Forms 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, the petitioner's Form 1120S return stated current assets of \$58,368.00 and \$99,549.00 in current liabilities. Therefore, the petitioner had <\$41,181.00> in net current assets for 2001. Since the proffered wage was \$24, 627.20 per year, this sum is less than the proffered wage.
- In 2002, the petitioner's Form 1120S return stated current assets of \$22,692.00 and \$49,668.00 in current liabilities. Therefore, the petitioner had <\$26,976.00> in net current assets for 2002. Since the proffered wage was \$24, 627.20, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

The petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Since depreciation is a deduction in the calculation of taxable income on tax Forms 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel, by forthrightly submitting complete tax records and other information, has established a case for application of *Matter of Sonogawa*. He has asserted that CIS should look at the petitioner's entire business operation and consider the circumstances of the petitioner during the period examined. CIS will review the totality of all the evidence the petitioner has submitted to determine if petitioner has the ability to pay the proffered wage following the case precedent, *Matter of Sonogawa*. For the reasons expressed above, even though the petitioner claims to be a unified business organization of five companies, it is evident from the tax return information submitted that the petitioner is the employer identified in the certified Alien Employment Application by Federal Employer Identification Number. The petitioner has not submitted other tax returns for other companies into evidence. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed

during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. 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 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The petitioner has not paid the beneficiary the proffered wage for the period under examination, 2001 through 2002. The owner, in his letter dated June 14, 2004, stated but did not submit documentary evidence to prove, that the beneficiary has been working at the petitioner's Glendora, New Jersey, location since September of 2000. Other companies located at other locations issued the W-2 forms submitted into evidence. The petitioner explains this discrepancy as an accounting error, but reasonably, if there were an acknowledged error, W-2 forms correcting the mistake would have been issued in the matter.

Petitioner also raises the issue of a one time possibly recoupable expense of \$14,000.00. Since the letter mentioning this expense was written in 2004, and the date of the expense was not given, and the taxable income loss in 2001 and 2002 is more than \$14,000.00, the fact of the repair and its effect on the corporation's income can have little probative value.

According to the tax returns submitted, while the petitioner's gross annual income increased significantly in 2002, the taxable income loss remained. During the period examined, 2001 and 2002, the petitioner was in a period of low profits, and, the petitioner has not asserted an expectation of profitability. In years 2001 and 2002, by any means of examination explained above, the petitioner could not pay the proffered wage.

Counsel has not established a case for application of *Matter of Sonegawa*. Unusual or unique circumstances have not been shown to exist in this case to parallel those in *Sonegawa*.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by the petitioner, that for the period 2001 and 2002, the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.