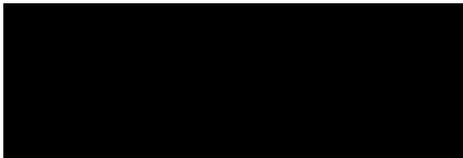




U.S. Citizenship
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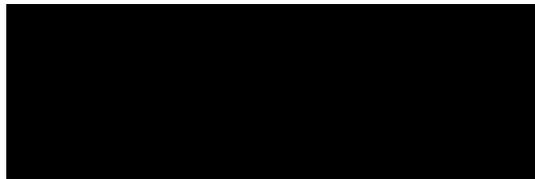
Petitioner:



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 D. 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 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 beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the counsel submits 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 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$18.50 per hour (\$38,480.00 per year). The Form ETA 750 states that the position requires three 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 United States Internal Revenue Service (IRS) Form 1120 tax return for 2001; copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted 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 requested:

Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$38,480 as of April 27, 2001, the date of filing and continuing to the present.

As an alternative you may submit annual reports for 2001, which are accompanied by, audited or reviewed financial statements.

If the beneficiary was employed by you in 2001, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the beneficiary's U.S. federal Form 1040 tax return for year 2001, and, several of the petitioner's bank checking account statements to October 31, 2001.

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 submitted the petitioner's federal tax returns for 2001 through 2003, and a complied financial statement for the business dated March 31, 2002.

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. No evidence was submitted to show that the petitioner employed the beneficiary.¹

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.

The petitioner's tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$38,480 per year from the priority date of April 9, 2001:

- In 2001, the Form 1120 stated taxable income² of \$9,424.00.

¹ According to the beneficiary's G-325A Form submitted to CIS as found in the record of proceeding, the beneficiary was self-employed in construction since February 1999, at least until the date of signing of the form on December 23, 2002.

² IRS Form 1120, Line 28.

- In 2002, the Form 1120S stated taxable income³ of \$22,645.00.
- In 2003, the Form 1120S stated taxable income of \$63,277.00.

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. There is no evidence that the petitioner employed the beneficiary.

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 in years 2001 and 2002. The petitioner did have sufficient income in 2003 to pay the proffered wage.

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 1120 and 1120S federal tax returns. 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.

Examining the Form 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L⁵ found in each of those returns indicates the following:

- In 2002, the petitioner's Form 1120S return stated current assets of \$152,065.00 and \$235,043.00 in current liabilities. Therefore, the petitioner had <\$82,978.00>⁶ in net current assets for 2002. Since the proffered wage was \$38,480.00 per year, this sum is less than the proffered wage.
- In 2003, the petitioner's Form 1120S return stated current assets of \$139,712.00 and \$218,130.00 in current liabilities. Therefore, the petitioner had <\$78,418.00> in net current assets for 2003. Since the proffered wage was \$38,480.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001⁷ through 2003 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 net current assets.

³ IRS Form 1120S, Line 21.

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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ There was no Schedule "L" included in the 2001 tax return submitted by petitioner.

⁶ 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.

⁷ Since the petitioner has the burden to come forward with probative evidence of the ability to pay, and since there is no explanation why Schedule "L" from the 2001 tax return was not submitted along with the return, the petitioner has not proven that in 2001 it had the ability to pay the proffered wage through an examination of its net current assets.

Counsel has submitted a compiled financial statement for the business dated March 31, 2002 to show the ability to pay the proffered wage. Counsel cites no legal precedent for the admissibility of the compiled financial statement, and, according to regulation,⁸ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

A *compilation* is limited to presenting in the form of financial statements information that is the representation of management. An *audit* is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A *review* is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in CIS deliberations in these matters. The statements presented were not audited.

The accounting service that prepared the financial statement, in a cover letter dated February 26, 2004 to that report, qualified its assurances to the financial statement as follows:

Management has elected to omit substantially all the disclosures and statement of cash flows by generally accepted accounting principles. If the omitted disclosures and statement of cash flows were included in these financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

In a cash flow statement, the sources of cash are disclosed according to generally accepted accounting principles (GAAP). The general categories are: cash received from operations; and, cash received from investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the balance sheet and income statement, presents an analysis of the financial health of a business. With that important data withheld by the petitioner, and, the accountants curtailed to produce only a compiled report, the compiled statement can have little probative value in the determination of the ability to pay the proffered wage.

Counsel has submitted the petitioner's checking account statement for the first three quarters of 2001. Counsel's reliance on the balances in the petitioner's checking account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. 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 reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

⁸ 8 C.F.R. § 204.5(g)(2).

CIS will review the totality of all the evidence the petitioner has submitted to determine if the petitioner has the ability to pay the proffered wage following the case precedent, *Matter of Sonogawa*. *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 *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The petitioner has not employed the petitioner, and therefore, it has not paid the beneficiary the proffered wage for the period under examination 2000 through 2003. According to the tax returns submitted, the petitioner's gross annual income decreased significantly in 2002, and it has rebounded somewhat in 2003, but it is still off its high by \$179,000.00. Payroll expenses varied widely on those returns from \$79,865.00 in 2001, to \$8,520.00 in 2002, then to \$16,812.00. There is no explanation given for this wide variation. The proffered wage offered to the beneficiary of \$38,480.00 per year would not seem to be in line with wages presently paid by the petitioner.

After a period of low profits, the petitioner has experienced an increase in taxable income. Taxable income in year 2001 was \$9,425.00, while in year 2003 it rose to \$63,277.00. Along with this increase, the wages paid by the petitioner decreased. Counsel has submitted a tax return that does show the ability of the petitioner to pay the proffered wage in 2003. However, 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 Sonogawa*. Unusual or unique circumstances have not been shown to exist in this case to parallel those in *Sonogawa*.

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.