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U.S. Citizenship
and Immigration
Services

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FILE: LIN 04 047 52544 Office: NEBRASKA SERVICE CENTER Date: **OCT 21 2005**

IN RE: 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 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 software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

On appeal, counsel submits additional evidence and asserts that the petitioner has demonstrated its continuing financial ability to pay the certified wage.

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 June 16, 2003. The proffered wage as stated on the Form ETA 750 is \$50,000 per annum. On Form ETA 750B, signed by the beneficiary on June 4, 2003, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, the petitioner states that it was established in 1997, has a gross annual income of \$900,000 and currently employs thirteen workers. In support of the petitioner's ability to pay the beneficiary's proposed wage offer, the petitioner initially submitted a letter, dated November 26, 2003, signed by its president, [REDACTED] Mr. [REDACTED] states that the petitioner has projected gross revenues of \$900,000 and can pay the beneficiary the proposed wage offer of \$50,000. The petitioner also submitted copies of computer print-outs showing its quarterly federal filing information for the second and third quarter of 2003.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on March 3, 2004, the director requested additional evidence pertinent to that ability. He advised the petitioner that it had a number of immigrant petitions pending with Citizenship and Immigration Services (CIS) and that it should submit audited profit/loss statements, complete bank account records, and/or

personnel records. The director further requested the petitioner to provide a copy of its 2003 tax return, or, if not available, its 2002 tax return, as well as copies of any Wage and Tax Statements (W-2s) if the petitioner employed the beneficiary in 2002 or 2003.

In response, the petitioner supplied an incomplete copy of its Form 1120S, U.S. Income Tax Return for an S corporation for 2003, consisting of only the first page. It shows that the petitioner files its taxes using a standard calendar year. For this year, the petitioner reported ordinary income of \$25,129.¹ The petitioner also submitted a copy of a print-out of its quarterly federal filing information for the fourth quarter of 2003, as well as copies of bank statements covering the period from March 2003 to February 2004. Counsel's transmittal letter asserts that new employees are expected to generate additional revenue and support the petitioner's payroll. She also states that this petitioner has nine other immigrant petitions pending and that it hadn't employed the beneficiary.

Following a review of the 2003 partial copy of the income tax return, the federal filing information, and the bank statements, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 6, 2004 denied the petition.

On appeal, counsel resubmits the one-page copy of the petitioner's 2003 corporate tax return, as well as copies of the other previously submitted evidence. Counsel also submits a letter, dated May 24, 2004, from its accountant, [REDACTED] CPA. The letter states that as of December 31, 2003, the petitioner's accounts receivable were \$126,790 and as of December 31, 2002, they were \$84,276. The accountant adds that total gross revenue as of the period ending April 30, 2004 was \$705,650.

Counsel contends that the petitioner's evidence showed sufficient cash flow to pay the proffered salary to the beneficiary. Citing *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), counsel argues that the director failed to consider the beneficiary's ability to generate additional revenue for the petitioner's business. Counsel also relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in support of the petitioner's position that the petition can be approved based on its expectations of increasing business and profits.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it may have 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. In the instant case, there is no evidence in the record to suggest that the petitioner has employed the beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figures 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

¹ For purposes of this review, the petitioner's ordinary income shown on line 21 will be treated as its net taxable income.

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). Contending that the petitioner's gross receipts reached a certain level or exceeded the proffered wage is insufficient as it is also necessary to consider the expenses generated in order to produce the gross receipts. Similarly, it is noted that the accountant's letter, submitted on appeal, failed to discuss the petitioner's accounts payable or other expenses associated with the petitioning business. 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.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. Bank statements show only a portion of a petitioner's available resources and do not reflect other encumbrances that may affect a petitioner's continuing ability to pay the proffered wage. Further, 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. As noted in the regulation, the evidence establishing a petitioner's ability to pay a certified wage must include either federal tax returns, audited financial statements, or annual reports. While this regulation allows additional material "in appropriate cases," the regulation neither states nor implies that it may be considered in lieu of the prescribed evidence.

To the extent that the petitioner's one-page federal tax return for 2003 may be considered, it is noted that it shows that the petitioner's net income of \$25,129 was insufficient to demonstrate that it could pay a certified wage of \$50,000 for this beneficiary or for other beneficiaries with a similar priority date and similar salaries.² A petitioner filing for multiple beneficiaries must show that it has sufficient income to pay all the wages beginning at the individual priority dates and continuing until the present. It is further noted that no consideration can be given to the petitioner's net current assets during the relevant period as the petitioner failed to submit an audited financial statement or a complete copy of any federal tax return(s).³

² We do not accept the director's rationale in prorating the petitioner's obligation to pay the proffered wage. We will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

³ Besides net income, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as an alternative method of determining its ability to pay the certified wage. Net current assets can be calculated from the figures contained on Schedule L of a petitioner's corporate tax return.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh, supra*, in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented by the petitioner's 2003 tax return. The regulation at 8 C.F.R. § 204.5(g)(2), issued in 1991, specifies the type of evidence required to establish the continuing financial ability to pay the proffered wage. It is noted that the petitioner's partial copy of the 2003 tax return has not satisfied this requirement.

In the context of the financial information contained in the record, counsel also contends that the petition may be approved where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. *Matter of Sonogawa, supra*. The *Sonogawa* case relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner has not demonstrated that unusual circumstances have been shown to exist in this case similar to those in *Sonogawa*. The 2003 tax return submitted to the record does not represent a framework of profitable years analogous to the *Sonogawa* petitioner. From the evidence provided in this case, the AAO cannot conclude that the petitioner has demonstrated that such unique circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate its continuing ability to pay the proffered wage as of the visa priority date and must submit either federal tax returns, annual reports, or audited financial statements as part of this demonstration. Based on a review of the evidence in the record and the evidence and argument offered on appeal, the AAO concludes that the petitioner's evidence has not demonstrated that it has had the continuing ability to pay the proffered wage beginning on the priority date.

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.