

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



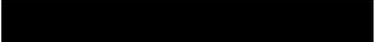
U.S. Citizenship
and Immigration
Services

PUBLIC COPY



BC

FILE: EAC 04 138 50600 Office: VERMONT SERVICE CENTER Date: **AUG 18 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant manager. 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 ability to pay the proffered wage as of the priority date and continuing. The director denied the petition accordingly.

On appeal, counsel states the Citizenship and Immigration Services (CIS) failed to give proper weight to the petitioner's monthly bank account statements, and to the petitioner's depreciation expenses.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 7, 1998. The proffered wage as stated on the Form ETA 750 is \$32,000 annually. On the ETA 750, the beneficiary claimed that he had worked for the petitioner as a waiter since May 5, 1997.

On the petition, the petitioner indicated it was established on April 25, 1997, had 24 employees, and a net annual income of \$422,709. With the petition, the petitioner submitted its IRS Form 1120U.S. Corporation Income Tax Return for tax years 1997 and 2001, checking account monthly bank statements for the petitioner from PNC Bank for December 1997 and January 1998, and a W-2 form for the beneficiary for tax year 2002. The petitioner's 1997 income tax return indicated taxable income before net operating loss deduction and special deductions of \$312, and the petitioner's income tax return for tax year 2001 indicated taxable income before net operating loss deduction and special deductions of \$70,421. The beneficiary's W-2 Form indicated that the petitioner had paid him \$18,000 in tax year 2002.

With regard to the petitioner's ability to pay the proffered wage as of the priority date of January 7, 1998, counsel stated that at the end of January 1998, the petitioner's ending balance was \$16,483, and that the petitioner's

income tax return established \$14,500 in expendable income, including \$14,177 in depreciation. Counsel noted that the ending balance from the petitioner's January bank statement and from the petitioner's expendable income totaled \$31,000. With regard to the petitioner's continuing ability to pay the proffered wage, counsel stated that the petitioner's 2001 corporate income tax return with a net income of over \$70,000 established this ability as well as the beneficiary's 2002 W-2 Form.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 23, 2004, the director requested additional evidence pertinent to that ability. The director requested that the petitioner provide additional evidence to establish that the petitioner had the ability to pay the proffered wage of \$32,000 as of January 7, 1998, and continuing to the present. The director specifically requested a copy of the petitioner's 1998 corporate income tax return, with all attachments and schedules, as well as a copy of the beneficiary's W-2 form for tax year 1998.

In response, the petitioner submitted Form 1120 corporate tax return for the petitioner for the year 1998. Counsel stated that the petitioner's net current assets based on the tax return's Schedule L was \$147,988, which is greater than the proffered wage of \$32,000. Counsel also stated that the petitioner's total assets, based on Schedule L, were \$302,636, while the petitioner's net assets was the difference between total assets and the combined total of the petitioner's account payables (\$36,716) and retained earnings (\$117,932).

Counsel also resubmitted the petitioner's check banking statement form January 1998, and cited from the regulation 8 C.F.R. § 204.5(g)(2) which states, in part, "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 the Service."¹ Counsel stated that as of the end of January 8, 1998, the petitioner's bank account clearly showed a surplus in cash of \$16,488.32, which is greater than the proffered wage on a monthly basis.

Finally counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Com. 1967). Counsel stated that the CIS approved this petition despite the fact that the petitioner's net profit had not been commensurate with the proffered wage. Counsel stated that although in the instant petition the net income is insufficient to pay the proffered wage, the petitioner can establish its ability to pay the wage based on the petitioner's current assets and its bank account 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 October 14, 2004, denied the petition. The director stated that the petitioner's 1998 federal income tax return indicated the petitioner's net income was -\$118,147, and the accompanying Schedule L balance sheet showed the petitioner possessed \$31,749 in current assets and \$36,716 in current liabilities. The director stated that since the petitioner had insufficient net income in the priority date year of 1998 and its current assets did not exceed its current liabilities in an amount sufficient to pay the proffered wage, the petitioner did not have the ability to pay the proffered wage. The director also noted that the petitioner had submitted bank statements from 1998, and that during that year, the ending balances were routinely less than the proffered wage. The director further noted that the bank statements did not show ending balances that increased and remained at about the amount of the proffered wage of \$32,000 for a sustained period

¹ The Service, or legacy INS, is now Citizenship and Immigration Services. (CIS)

of time. The director then concluded that the bank statements did not verify the petitioner's ability to pay the beneficiary the proffered wage.

On appeal, counsel submits the petitioner's ending monthly statements from January 1998 to December 2003. Counsel states that each and every monthly statement indicates a balance that far exceeds the beneficiary's monthly wage of \$2,666.67. Counsel notes that in January 1998, the bank statement had a balance of \$16,483.32 and that the December 2003 bank statement shows an ending balance of \$389,177.61. Counsel states that since the ending balance is greater than the proffered wage, it clearly establishes the employer's ability to pay the monthly salary of \$2,666.67.

Counsel also asserts that the director in her decision did not give enough weight to the petitioner's income tax returns for 2001 and 2002. Counsel cites to an unpublished decision by the AAO in which it was concluded that the petitioner's net income should be based upon the total of taxable income, depreciation, and cash on hand. Counsel states that deductions for depreciation and amortization are income tax deductions only and that they do not represent actual out of pocket cash expenses during the year, which is why they are referred to as "non cash deductions". Counsel states that to do a proper analysis of how much actual income petitioner has to live on during the taxable year after the beneficiary's proffered wage has been subtracted, the non-cash depreciation and amortization deductions that the petitioner took in 1998 have to be disregarded. Counsel asserts that the petitioner's available income to live on after the proffered wage was subtracted was actually much higher than the amount shown as the petitioner's taxable income in its income tax return for 1998. Counsel states that the petitioner's adjusted income is \$132,879.

Counsel in the petitioner's original petition, submitted the petitioner's bank statements for December 1997 and January 1998. On appeal counsel submitted bank statements from 1998 to 2003. Counsel states that the petitioner's monthly bank balance is sufficient to pay the beneficiary's monthly salary of \$2,666.67. Counsel's reliance on the balances in the petitioner's bank 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 statement for January 1998 somehow reflect additional available funds that were not reflected on its 1998 tax return. Counsel also did not provide an explanation for why the petitioner's bank statement for January 1998 should be given more probative weight than the petitioner's 1998 federal income tax return.

It is also noted that the AAO does not examine whether the petitioner has sufficient funds to pay the monthly wage of the petitioner, but rather whether the petitioner has sufficient funds to pay the entire proffered wage, or the difference between actual wages and the proffered wage, if wages are paid. Further, if the bank balances were utilized to pay the monthly wages, each subsequent bank balance would reflect less funds available to pay the proffered wage. As such the examination of the petitioner's actual bank balances vis a vis a prorated monthly wage is not dispositive in these proceedings.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner since May 1997. However, the petitioner did not submit the beneficiary's W-2 form for priority date year of 1998. Therefore the petitioner did not establish that it paid the beneficiary a salary equal or greater than the proffered wage of \$32,000 in the priority date year of 1998. The record reflects no further wage information for the beneficiary during the years 1998, 1999, 2000, or 2001. Although the petitioner did submit the beneficiary's W-2 form for tax year 2002 that indicates the petitioner paid the beneficiary \$18,000, this wage is not equal or greater than the proffered wage of \$32,000. Therefore the petitioner has not established that it paid the beneficiary a salary equal to or greater than the proffered wage as of the priority date and to the present time. Furthermore, the petitioner is obligated to show it can pay the entire proffered wage in the years 1998, 1999, 2000, and 2001, as well as the difference between wages actually paid and the proffered wage in tax year 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Contrary to counsel's assertion, CIS examines the petitioner's net income, 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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, now CIS, should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng* at 537.

The petitioner is structured as a corporation. The petitioner's net income is the taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions. Although the petitioner submitted its federal income tax return for tax year 1997, since the priority date is January 7, 1998, the petitioner's taxable income in 1997 is not dispositive in these proceedings. The AAO will examine the petitioner's taxable income as established in the tax returns found in the record, namely, tax year 1998 and 2001. In tax year 1998, the petitioner's taxable income is -\$118,147, while the petitioner's taxable income in tax year 2001 is \$70,421. Since

the petitioner's taxable income for tax year 2001 is greater than the proffered wage, the petitioner has established that it has the ability to pay the proffered wage in tax year 2001. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Based on its taxable income in tax year 1998, the petitioner did not establish that it has the ability to pay the proffered wage in the priority date year. Furthermore, since the petitioner did not submit its federal income tax returns for the years 1999, 2000, and 2002, the petitioner has not established its continuing ability to pay the proffered wage for any year from the priority date year of 1998 to tax year 2000, and then during tax year 2002.

The petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its 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 out of those net current assets. As previously stated, the petitioner only submitted its corporate income tax returns for tax years 1998 and 2001 to the record.³ With regard to tax year 2001, the petitioner had sufficient taxable income to pay the proffered wage. The petitioner's tax return for 1998 reflects the following information:

	1998
Taxable income ⁴	\$ -118,147
Current Assets	\$ 31,749
Current Liabilities	\$ 97,716
Net current assets	\$ -64,967

² 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.

³ As stated previously, the petitioner's income tax return for tax year 1997 is not dispositive in these proceedings.

⁴ As previously stated, taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998, and thus, has to establish its ability to pay the entire proffered wage of \$32,000. In 1998, as previously illustrated, the petitioner shows a taxable income of -\$118,147, and negative net current assets of \$64,967, and has not, therefore, demonstrated the ability to pay the proffered wage as of the priority date year. Although the petitioner has established its ability to pay the proffered wage based on its net income in tax year 2001, a petitioner must establish the elements for the approval of the petition at the time of filing. *See Katigbak*. In the instant petition, the petitioner has to establish its ability to pay the proffered wage as of tax year 1998. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the 1998 priority date to the present.

In its response to the director's request for further evidence and on appeal, counsel states that the petitioner's depreciation expenses should be added back to the petitioner's negative net income for tax year 1998, so that the petitioner would show a positive net income of \$132,879. Counsel on appeal refers to a decision issued by the AAO concerning the examination of depreciation expenses in determining another petitioner's ability to pay a proffered wage, but does not provide its published citation. 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). Thus, the AAO does not have to follow the findings in the previous AAO decision cited by counsel. Furthermore, the previous AAO decision is erroneous, as the AAO does not examine depreciation expenses when it considers the petitioner's net income. *See Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985).

In addition, in the petitioner's response to the director's request for further evidence, counsel stated that in 1998 the petitioner's total assets, based on Schedule L, were \$302,636, while the petitioner's net assets was the difference between total assets and the combined total of the petitioner's account payables and retained earnings. As stated previously, the AAO examines the petitioner's current assets and current liabilities in determining the petitioner's net current assets. The petitioner's year-end current assets are shown on Schedule L, lines 1 through 6, and its year-end current liabilities are shown on lines 16 through 18 of Schedule L. The AAO does not examine the petitioner's retained earnings in its determination of net current assets.

Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record demonstrates that the petitioner's retained earnings are unappropriated; however, the petitioner's retained earnings in tax year 1998 are -\$117,932 and, thus, are not cash or current assets that would be available to pay the proffered wage.

Counsel also cites *Matter of Sonogawa* in stating that the petitioner's depreciation and amortization expenses be considered an additional source of funding for the proffered wage. *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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 1998 was an uncharacteristically unprofitable year for the petitioner. As stated previously, the petitioner did not submit its federal income tax returns for the years 1999, 2000, or 2002 to further establish whether 1998 was an uncharacteristically unprofitable year. Furthermore, the petitioner submitted no further documentation as to the petitioner's business reputation. It is also noted that the petitioner has been in business for seven years at the time it filed the instant petition, in contrast to the petitioner in *Sonogawa* who had eleven years of business experience and activity at the time her petition was filed.

As previously stated, the petitioner's bank statements are also not viewed as additional sources of funds with which to pay the proffered wage. Therefore the petitioner has not established that it has additional funds with which to pay the proffered wage, or that it has the ability to pay the proffered wage as of the 1998 priority date and to the present. Therefore, the director's decision shall stand, and the petition shall be denied.

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.