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**U.S. Citizenship
and Immigration
Services**

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FILE: EAC 04 010 50325 Office: VERMONT SERVICE CENTER

Date: APR 04 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, 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 restaurant specializing in Salvadoran and Mexican dishes. It seeks to employ the beneficiary permanently in the United States as a cook's helper. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition.¹ 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. The director denied the petition accordingly.

On appeal, counsel submits:

- A brief; and,
- A Form W-3 Transmittal of Wage and Tax Statements for 2002 and 2003, with attached W-2s of workers other than the beneficiary.

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. *See* 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on August 19, 1997. The petitioner, seeking to substitute the beneficiary in place of another named in the initial ETA 750-B, has filed a substituted ETA 750 B, which the beneficiary signed without indicating the date of her signature. The proffered wage as stated on the Form ETA 750 is \$11.47 per hour (\$23,857.60 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on May 1, 1996. According to the tax returns in the record, the petitioner's fiscal years lasts from January 1 to December 31. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- Counsel's G-28; and,
- Copies of the petitioner's Form 1120 for 1997–2001.

On June 21, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports,

¹The record of proceedings does not contain an original copy of the ETA 750.

federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's federal income tax returns for 2002 and 2003, and alternative proof of ability to pay the proffered wage for 1997–2001.

In response, the petitioner submitted:

- Form 1120 for 2002 and 2003; and,
Counsel's yearly analysis of the petitioner's ability to pay the proffered wage.

The director denied the petition on October 29, 2004, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts, based upon *Matter of Sonogawa*, 12 I&N Dec. 612 ((1967, Reg. Com), that the petitioner has a reasonable expectation of continued increase in its business and profits, justifying approval of the petition. Further, counsel asserts that the tax returns show the petitioner had \$170,578 in 2002 labor costs, and \$44,405 labor costs in 2003, reflecting an ability to meet its payroll. Further, counsel asserts that in 2002 and 2003 the restaurant has gone through significant employee turnover, being \$41,793.90 in 2002, and \$22,885.80 in 2003, as corroborated by the W-2s in evidence. Finally, counsel suggests that net income that adds back deductions for depreciation and net operating loss, plus cash on hand and unappropriated retained earnings, would demonstrate the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through 2003.

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, 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 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. 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$23,857.60 per year from the priority date.

In 2003, the Form 1120 stated net income² of \$1,887.
 In 2002, the Form 1120 stated net income of -\$22,959.
 In 2001, the Form 1120 stated net income of \$23,557.
 In 2000, the Form 1120 stated net income of \$15,528.
 In 1999, the Form 1120 stated net income of \$25,268.
 In 1998, the Form 1120 stated net income of \$14,633.
 In 1997, the Form 1120 stated net income of \$13,489.

Therefore, except for the year 1999, during 1997–2003 the petitioner did not have sufficient net income to pay the 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. We reject, however, counsel's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.³ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the year in question, were as follows:

1997	-\$40,954
1998	-\$43,229
1999	-\$47,018

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

³ 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.

2000	-\$40,932
2001	-\$3,227
2002	\$2,867
2003	\$1,843

Therefore, 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 continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in her brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that "there are reasonable expectations of continued increase in business and profits," citing *Sonegawa*, 12 I&N Dec. 612 (BIA 1967). *Sonegawa* 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that any of the years from 1997 through 2003 were uncharacteristically unprofitable for the petitioner; rather, to the contrary, each year's return shows low or nonexistent profits. The petitioner's gross receipts for 1998 were \$262,048, while in 2003 gross receipts were \$330,000, which represents growth although unremarkable for that span of time.

Second, counsel asserts that the beneficiary will replace employees who created job vacancies that the petitioner can fill by hiring the beneficiary. Thus, counsel asserts that the petitioner lost employees apparently in 2003 and 2004, whose W-2 wages for 2002 totaled \$41,793.90, and many of whom were still working in 2003 when combined they earned \$22,885.801. However, counsel's assertions do not relate to the period surrounding the August 19, 1997, priority date, but instead to the years 2002 and 2003.⁴ Moreover, the record does not verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

⁴ We note that not only did the petitioner substitute the beneficiary for another period named in the initial ETA 750, but CIS records reveal a denial of a petition the petitioner had filed earlier on the beneficiary's behalf (EAC 03 11 53482).

We are not persuaded by counsel's assertion that the petitioner can demonstrate its ability to pay the proffered wage by combining both current assets and net income. Counsel suggests demonstrating that ability by totaling the petitioner's cash on hand, its unappropriated earnings, and its net income after adding back depreciation and net operating loss deductions. Net current asset, such as cash, are only an alternative to using an employer's net income or the wages it has paid the beneficiary as a means of determining the ability to pay the proffered wage. Simply put, net current assets must be considered separately from net income in making such a determination. The reason for this is that net current assets are calculated at the end of the year to see if their total is greater than the proffered wage, because from net current assets an employer can anticipate being able to pay the proffered wage out of those sorts of receipts. Therefore, contrary to counsel's suggestion, the petitioner's cash on hand should not be added to a petitioner's net income in determining the petitioner's ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not 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.

CIS records also reveal that the petitioner has filed petitions for other workers. One, with a priority date of March 31, 1997, was approved August 11, 1997. Another petition, with a priority date of January 13, 1998, was approved on May 26, 1999. Therefore, the petitioner must show that it had sufficient income to pay the wages of all such workers as of the instant petition's priority date.

The evidence submitted does not establish that the petitioner 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.