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U.S. Citizenship
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FILE:

EAC 03 228 51600

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 Acting Center Director (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. It seeks to employ the beneficiary permanently in the United States as a foreign specialty cook. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial 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 contends that the petitioner has demonstrated its continuing financial ability to pay the proffered 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 filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on September 26, 2001. The proffered wage as stated on Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 per year. On Form ETA 750B, signed by the beneficiary on September 24, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the preference petition, filed on July 28, 2003, the petitioner claims that it was established in 1997, has a gross annual income of \$213,895, an annual net income of \$13,930, and currently employs three workers.

In support of its ability to pay the proffered salary of \$24,960, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2001 and 2002. They indicate that the petitioner files its taxes uses a standard calendar year. The 2001 corporate tax return shows that the petitioner reported total income of \$142,943, officer compensation of \$74,880, \$4,350 in salaries or wages, no cost of labor, and net taxable income of \$584 before the net operating loss (NOL) deduction. Schedule L of the tax return reveals that the petitioner had \$23,308 in current assets and \$3,091 current liabilities, resulting in \$20,217 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of

liquidity and a possible readily available resource to pay a certified wage. Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end 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.

The petitioner's 2002 corporate tax return reflects that it declared \$156,982 in total income, officer compensation of \$74,880, \$2,700 in salaries and wages, no cost of labor, and \$4,912 in net taxable income before the NOL deduction. Schedule L indicates that the petitioner had \$27,967 in current assets and \$2,879 in current liabilities, yielding \$25,088 in net current assets.

On November 10, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage of \$24,960. She requested a copy of the petitioner's 2000 federal tax return, copies of bank statements for the six months preceding September 2001, and copies of any Wage and Tax Statements (W-2s) issued to the beneficiary showing the amount of wages paid if the petitioner employed him in 2000 and 2001.

In response, the petitioner, through counsel, resubmitted copies of the petitioner's corporate tax returns for 2001 and 2002, as well as a copy of one of the principal shareholder's individual tax return for 2001. Counsel's transmittal letter, dated February 4, 2004, states that the officer compensation of \$74,880 is divided between the two principal shareholders and officers, with each taking \$37,440. She notes that one of the officers, [REDACTED] reported adjusted gross income of \$48,940 on his 2001 individual tax return provided with the response. Counsel states that as referenced by an attached letter from Mr. [REDACTED] he worked as a cook in the business in 2001 and if he could have hired a cook, he would have not taken the full compensation and would have used the remaining funds to pay the proffered wage, as well as support his family. The referenced letter from Mr. [REDACTED] is not attached to the petitioner's response.

On June 23, 2004, the director denied the petition, concluding that neither the petitioner's reported net income nor cash funds shown on Schedule L of both the 2001 and 2002 tax returns provided sufficient monies to pay the proffered wage. The director noted that minimal salaries and no labor expense was reported on the tax returns and declined to add back the depreciation claimed. She found that the compensation of officers as reported on the tax returns would not be considered as it represents monies already expended by the corporation. The director also found that the monies already distributed to an officer as compensation, represent personal assets, and that CIS would not "pierce the corporate veil" to reclassify such funds as corporate assets available to pay the proffered wage.

On appeal, counsel submits a letter, dated July 23, 2004, from [REDACTED] Sr., a public accountant. Mr. [REDACTED] presents an analysis of the petitioner's 2002 corporate tax return. He finds that the petitioner's ability to pay the proffered wage should be demonstrated through adding a petitioner's depreciation deduction, as a non-cash expenditure, back to a petitioner's net income. Mr. [REDACTED] further concludes that a cash-on-hand asset, as may be reflected on line 1 of Schedule L of a petitioner's tax return, should also be added to the petitioner's revised net income figure.

Counsel also submits a copy of a W-2 issued to Hani A. Akovan, the petitioner's other officer and principal shareholder. The W-2 reflects that the petitioner paid \$13,750 in wages, tips, or other compensation to this individual in 2001.

Counsel maintains on appeal that the director erred in reviewing the petitioner's income tax returns for 2001 and 2002. She asserts that the cash balance at the end of the year should not be viewed as a separate and distinct amount when assessing the ability to pay the proffered wage. Counsel also contends that accepted accounting practices as presented in Mr. [REDACTED]'s analysis of the 2002 return support the addition of depreciation and Schedule L cash-on-hand back to the petitioner's income, and adds that CIS prior practice also mandates this for 2001, the sum of \$12,887 should be added back to the petitioner's net income. She additionally maintains that the petitioner's obligation to pay the proffered wage should be prorated to encompass the last three (3) months of 2001, because it is based on the visa priority date of September 26, 2001. Finally, counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the application of the proposition that in some cases, expectations of increasing business and profits may overcome evidence of small profits and justify the approval of a petition.

It is noted that the proffered wage will not be prorated for the portion of the year of 2001 that occurred after the priority date of September 26, 2001. We will not consider 12 months of income (or twelve months of wages paid to a beneficiary) as shown on a relevant tax return or W-2 towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income (or wages paid to a beneficiary) towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income (or payment of a 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.

It is also noted that prior AAO cases are not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions. Moreover, while both the 2001 and 2002 AAO decisions did include depreciation in the calculation, the facts reflect that the petitioner's net current assets in the 2001 case were sufficient to pay the proffered wage in the year covering the priority date, and in the 2002 decision, the petitioner's ordinary income by itself was enough to pay the proffered salary in the year covering the priority date.

The AAO also does not find that the beneficiary's replacement of Mr. [REDACTED]'s cooking duties and payment of the proffered wage derived from the application of compensation paid to Mr. [REDACTED] as shown by the 2001 W-2, is documented by direct evidence to the record. It is also unclear how this W-2 figure is reflected in the amounts reported on the 2001 tax return. Counsel's assertion in this regard, just as the assertion in the underlying record relating to the other principal shareholder and officer, Mr. Barouki, is documented only by the W-2 and does not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As noted by the director, this hypothesis rests upon adding back already distributed funds to one of the shareholders. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, the court 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.

In determining a petitioner's ability to pay a certified wage, CIS will examine whether a petitioner may have employed and paid wages to a beneficiary during a given period. If a petitioner establishes by credible

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. If either the petitioner's net taxable income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, no evidence has been submitted to establish that the petitioner employed and paid wages to the beneficiary.

CIS will then examine the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. Additionally, it will review a petitioner's current assets and current liabilities as reflected on Schedule L of the tax return as an alternative method of determining a petitioner's ability to pay the proffered wage. 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*, 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. With regard to depreciation as a reflection of the systematic allocation of the cost of a tangible long-term asset, it is noted that depreciation is taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The court in *Chi-Feng Chang* further 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 536.

If an examination of the petitioner's net income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, as stated above, CIS will review a petitioner's net current assets. We must reject, however, the assertion that cash- on- hand, as reflected on line 1 of Schedule L, should be isolated from the other current assets or not included in the calculation of net current assets, which results from comparison to current liabilities.¹

¹ Similarly, net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. Net current assets at the end of

In this case, as set forth above, while we find that the petitioner's 2002 tax return shows that its net current assets of \$25,088 in that year could cover the proffered wage and demonstrate its ability to pay the certified salary, we do not find that the petitioner's 2001 tax return, reflecting net income of \$4,912 and net current assets of \$20,217, showed that either of these amounts could pay the proffered wage of \$25,088. The petitioner has not demonstrated its ability to pay the proffered wage in 2001.

Counsel asserts that pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the petitioner's ability to pay the certified wage may be based on the expectations of increasing business. As noted above, this precedent is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. That case, however 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 petitioner had 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. In this case, the petitioner, a six-year operation at the time of filing the petition, has provided two income tax returns showing a modest increase in gross income and minimal net income. It cannot be concluded that this represents a framework of profitability similar to the circumstances discussed in *Sonogawa* and that the petitioner has demonstrated that such unusual circumstances exist in this case, which parallel the facts set forth in that case.

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition. 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.

a given year which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.