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**U.S. Citizenship  
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Services**

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FILE: EAC 04 247 51315 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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automotive bodywork company. It seeks to employ the beneficiary permanently in the United States as an automotive body repairer. 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 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 a brief and additional documentation.

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 April 24, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$24.16, or an annual salary of \$50,252.80. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since March 1999.

On the petition, the petitioner claimed to have been established in May 1997, to have 18 employees, a gross annual income of \$1,425,000, and net annual income of \$74,000. In support of the petition, the petitioner submitted a Costa Rican business license for the beneficiary's automotive repair shop in Costa Rica as of March 1984. The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 2001 that indicated the petitioner had ordinary income of -\$13,457.

On October 4, 2004, the director denied the petition. The director stated that the petitioner's ordinary income loss of \$13,457 in tax year 2001 was insufficient to establish that the petitioner had the ability to pay the

proffered wage as of the 2001 priority date. The director referred to the Yates Memo dated May 2004<sup>1</sup> and stated that under certain circumstances, a petition could be denied without benefit of a request for additional evidence. The director stated that one such circumstance was when the record was complete with respect to all the required initial evidence as specified in the regulations and on the petition and accompanying instructions. The director then stated the instant petition contained a complete record, and the documents submitted to the record did not establish the petitioner's ability to pay the proffered wage.

On appeal, counsel states that the record was not complete in the instant petition and that the denial of the petitioner without requesting further evidence was not appropriate. Counsel states that Citizenship and Immigration Services (CIS) should analyze the totality of the petitioner's circumstances, in the instant petition. Counsel submits a letter from [REDACTED] (Mr. [REDACTED] the petitioner's president, as well as the petitioner's tax returns for 2001, 2002 and 2003. With regard to the petitioner's IRS Forms 1120S for tax years 2002 and 2003, these documents indicate that the petitioner had ordinary income of -\$26,971 in 2002 and \$58,073 in 2003.

Counsel also submits copies of five W-2 forms for the petitioner's employees for tax year 2002, and twelve W-2 Forms for the petitioner's employees for 2003. Counsel then submits copies of the beneficiary's W-2 Form for tax years 2002 and 2003. These two documents indicated the beneficiary earned \$41,454.10 in 2002 and \$48,167 in 2003. Finally counsel states that the W-2 form for 2001 could not be found, and submits copies of five of the beneficiary's weekly pay stubs from 2001. The beneficiary's pay slip for the week ending September 15, 2001 indicates that the beneficiary earned \$33,442.15 as of that date.

In his letter, Mr. [REDACTED] states that the loss for income tax purposes for the years 2001 and 2002 included payroll expenses and more importantly non-cash related deductions, such as depreciation and amortization. Mr. [REDACTED] then states that the petitioner's financial records, balance sheets and income/expense reports were analyzed and he concludes that the nominal loss shown on the federal tax returns should not be construed to mean that the petitioner had a deficiency in their cash position, or that they were unable to meet expenses, especially payroll. Mr. [REDACTED] states that this was not the case for the petitioner at the end of 2001 and 2002.

Mr. [REDACTED] states that in 2001, the petitioner paid \$494,150 in wages, and also deducted \$26,283 in depreciation and \$3,039 in employee incentives as other deductions that counts for a part of the employee compensation. Mr. [REDACTED] states that the combined sum of depreciation deductions and the employee incentives in 2001, or \$29,322, is sufficient to cover the difference between what the beneficiary earned in 2001 and the proffered wage.

Mr. [REDACTED] also notes that in tax year 2002, the beneficiary was paid \$41,454 and that in tax year 2003, the beneficiary was paid \$48,167 in 2003, which is \$2,085.50 less than the proffered wage. Mr. [REDACTED] states that the beneficiary's W-2 form for 2001 is not available, but that by analyzing the beneficiary's pay stubs for 2001, the beneficiary earned \$48,172.80, which is \$2,080 less than the proffered wage. Mr. [REDACTED] also notes that the beneficiary in 2001 was employed through a staffing agency that is no longer in business. Mr. [REDACTED] also states that the beneficiary had taken some personal days in 2001 for which the petitioner does

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<sup>1</sup> Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

not pay. Mr. [REDACTED] notes that the petitioner had paid the staffing agency \$571,847 in 2001 which included the salary paid to the beneficiary.<sup>2</sup>

On appeal, the petitioner's president asserts that the petitioner's depreciation deductions and the employee incentives could be considered as funds available to pay the difference between the beneficiary's actual wages and the proffered wage. However, CIS does not consider such expenses in its examination of the petitioner's net income. 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.

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 petitioner submitted W-2 salary statements for the beneficiary for the years 2002 and 2003, and also submitted five weekly pay slips for the beneficiary for tax years 2001. Although the petitioner's president states that the pay slips can be used to extrapolate an annual salary of \$48,172.80, the petitioner provides no further evidentiary documentation to substantiate this assertion with regard to the beneficiary's annual salary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is also noted that each of the five pay slips submitted to the record indicates a different weekly salary based on commissions and hourly wages. Thus, it is not clear how the petitioner's president would arrive at his estimation of the beneficiary's annual salary for 2001. Based on the documentation in the record, the beneficiary earned \$33,442.15 in 2001, \$41,454.10 in 2002, and \$48,167 in 2003. In the instant case, the petitioner did not establish that it employed and paid the beneficiary a salary equal to or greater than the proffered wage in 2001 and onward. Thus, the petitioner cannot establish its ability to pay the proffered wage based on the beneficiary's previous wages.

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

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<sup>2</sup> This figure is the combined sum of \$119,584, leased employees, administrative, other deductions, line 19, and \$452,264, leased employees, Schedule A, other costs, line 5, as described in the petitioner's 2001 tax return's supplemental schedules.

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.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax returns for 2001, 2002, and 2003 shows the following amounts of ordinary income: -\$13,457, -\$26,971, and \$58,073. With regard to tax year 2003, the petitioner has established that it has sufficient net income to pay the difference between the beneficiary's actual wages of \$48,167 in 2003, and the proffered wage of \$50,252.80, namely, \$2,085.50. 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). The petitioner has not established that as of the 2001 priority date and through 2002, it has the ability to pay the difference between the beneficiary's actual wages and the proffered wage based on its net incomes in those two years.

Nevertheless, 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. 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.<sup>3</sup> 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. The petitioner submitted the following information for tax years 2001 and 2002:

2001

2002

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<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Ordinary Income	\$ - 13,457	\$ -26,971
Current Assets	\$ 98,026	\$ 74,351
Current Liabilities	\$ 103,477	\$ 116,660
Net current assets	\$ -5,451	\$ -42,309

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of -\$13,457 and net current assets of -\$5,451, and has not, therefore, demonstrated the ability to pay the difference between the beneficiary's established wages of \$33,442.15, and the proffered wage of \$50,252.80, namely, \$16,810.65. In 2002, the petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In this tax year, the petitioner shows a net income of -\$26,971 and net current assets of -\$42,309, and has not, therefore, demonstrated the ability to pay the difference between the beneficiary's actual wages of \$41,454.10, and the proffered wage of \$50,252.80, namely, \$8,798.70.

As previously noted, the petitioner's depreciation expenses and monies used for employee incentives are not considered additional funds with which to pay the difference between the beneficiary's actual wages and the proffered wage in tax years 2001 and 2002. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage.

On appeal counsel states that the totality of the petitioner's circumstances should be examined and cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). *Matter of Sonogawa* 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 2001 was an uncharacteristically unprofitable year for the petitioner. The record reflects that tax year 2002 was also an unprofitable year for the petitioner, with a higher negative net loss.

The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it 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.

