

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



U.S. Citizenship
and Immigration
Services

66

PUBLIC COPY



FILE:



EAC-04-163-53848

Office: VERMONT SERVICE CENTER

Date: APR 25 2006

IN RE:

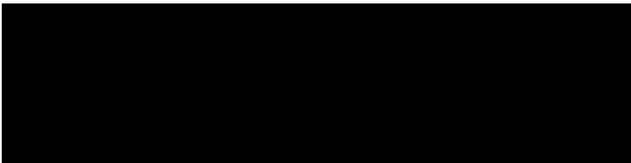
Petitioner:



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 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 travel company. It seeks to employ the beneficiary permanently in the United States as a travel guide. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 additional evidence.¹

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 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$32,552 per year. The Form ETA 750 states that the position requires two (2) years of experience in the job offered or in any management position.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

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 in 1989, to have a gross annual income of \$547,914, to have a net annual income of \$24,175, and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to have worked for the petitioner since July 2000.

With the petition, the petitioner submitted its Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002 pertinent to the ability to pay the proffered wage.

The director denied the petition on September 20, 2004, finding that the evidence submitted with the petition did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that depreciation, retained earnings and total assets demonstrates the petitioner's continuing 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 record of proceeding contains the beneficiary's W-2 form for 2001. The W-2 form shows that the petitioner employed and paid the beneficiary \$17,624 in 2001, which was \$14,928 less than the proffered wage. The petitioner did not submit the beneficiary's W-2 forms for 2002 and the following years. Therefore, the petitioner has established that it paid the beneficiary partial wages in 2001, but did not establish that it paid the full proffered wage during the period from 2002 through the present.

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.

On appeal counsel contends that depreciation should be added back as part of the true net income of the petitioner and should be considered in determining its ability to pay the proffered wage. Counsel's reliance on depreciation is misplaced. 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 evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002. The record before the director closed on April 29, 2004 with the receipt by the director of the petitioner's initial submissions. As of that date the petitioner's federal tax return for 2003 was due. Therefore the petitioner's tax return for 2003 is the most recent return available. However, the petitioner did not submit its 2003 tax return, nor did it explain the reason it was not submitted. The petitioner does not submit its tax return for 2003 with the instant appeal although it is allowed to submit additional evidence on appeal. The petitioner should address this issue in any future proceedings.

The tax returns in the record demonstrate the following financial information concerning the petitioner's ability to pay the difference of \$14,928 between the wages already paid to the beneficiary and the proffered wage in 2001 and the full proffered wage of \$32,552 per year in 2002 through the present.

In 2001, the Form 1120 stated net income² of \$14,516.

In 2002, the Form 1120 stated net income of \$24,175.

Therefore, for the years 2001 through 2002, the petitioner did not have sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage, or the proffered wage respectively.

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, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. Counsel claims on appeal that the petitioner had total assets of \$280,338, which exceeded liabilities of \$202,512 reflected on Lines 16 through 21 by \$77,826. Counsel's reliance on the petitioner's total assets in determining its ability to pay the proffered wage is misplaced. 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.

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

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 years 2001 and 2002, were \$(18,419) and \$(51,953) respectively. Therefore, the petitioner had insufficient net current assets to pay the difference between the wage paid to the beneficiary and the proffered wage in 2001 or the proffered wage in 2002.

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 or difference between the wage paid and 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 his 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 recommends the use of retained earnings to pay the proffered wage. 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 does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

On appeal, counsel submitted the petitioner's financial statements for 2003 with letters from the petitioner's accountant. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. A compilation is the management's representation of its financial position and is the lowest level of financial statements relative to other forms of financial statements. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. In any future proceeding, the petitioner must submit either tax returns or audited financial statement for 2003 and the following years.

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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel submits a letter from the petitioner and a W-2 form for [REDACTED]. The petitioner's letter advised that the beneficiary had replaced [REDACTED] who was an employee and left at the end of 2002. The submitted W-2 form for [REDACTED] shows that the petitioner paid him \$30,096.50 in 2001. However, the record does not verify his full-time employment in 2002, or provide sufficient evidence that the petitioner has replaced him with the beneficiary at the end of 2002. 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. Moreover, there is no evidence that the position of [REDACTED] involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of [REDACTED] or that he performed the duties of the proffered position. If he performed other kinds of work, then the beneficiary could not have replaced him. According to the Form ETA 750B the beneficiary has worked full time for the petitioner since July 2000. The petitioner's letter does not explain how the beneficiary replaced [REDACTED] in 2001 (the year of priority date) and later years if he was already working for the petitioner. In addition, even if the beneficiary replaced [REDACTED] and the wages paid to [REDACTED] in 2001 could have shown the petitioner's ability to pay the proffered wage through wages paid in 2001, it cannot establish the petitioner's ability for 2002 through the present.

Counsel contends that: "after the 9/11 disaster there was a sharp downturn in Japanese tourism. [The petitioner] had, of course, a concomitant downturn in business, and it has taken them until 2003 for their business to recuperate from this national debacle," and refers to *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 in a framework of profitable or successful years for the petitioner. Because the business happens to be located in the New York area and the labor certification application was filed in 2001 are not sufficient reasons to apply the *Sonogawa* rule to the instant case. The petitioner must establish that the year 2001 of "September 11" was an uncharacteristically unprofitable year in a framework of profitable or successful years for the petitioner. The petitioner did not provide any evidence showing its profitability and successfulness for the years before and after 2001. On appeal counsel submits financial statements for 2003 showing the petitioner's profitability and successfulness. However, it is unaudited, thus cannot be deemed as regulatory-prescribed evidence sufficient to rely upon in these proceedings.

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.

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.