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U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

Date:

DEC 29 2006

EAC 03 248 52305

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.

for Robert P. Wiemann, Chief
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 landscape company. It seeks to employ the beneficiary permanently in the United States as a project manager of landscaping/first-line supervisor. 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, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has the financial ability to pay the proffered salary.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$29.64 per hour, which amounts to \$61,651.20 per year. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claims to have worked for the petitioner since 1998.¹

The preference petition was filed on August 25, 2003. In support of its continuing ability to pay the proffered wage, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002. It reflects that the petitioner files its taxes using a standard calendar year. The 2002 return shows that

¹ In contrast, on the biographic questionnaire (Form G-325A), signed by the beneficiary on August 8, 2003, it is indicated that his employment with the petitioner began in May 1999.

the petitioner reported ordinary income of \$2,472 in 2002. Schedule L reflects that the petitioner had \$11,353 in current assets, \$17,051 in current liabilities, yielding -\$5,698 in net current assets. Besides net income, and as an alternative method of reviewing a petitioner's ability to pay a certified wage, CIS will examine a petitioner's net current assets in determining the ability to pay a proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² A corporation's year-end current assets and current liabilities are shown on line(s) 1(d) through 6(d) and line(s) 16(d) through 18(d) of Schedule L of its federal tax return. 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.

On July 20, 2004, the director requested additional evidence of the petitioner's ability to pay the proffered wage. He instructed the petitioner to provide copies of its 2001 and 2003 federal tax returns or alternatively, copies of annual reports supported by audited or reviewed financial statements. The director further requested copies of the petitioner's Transmittal of Wages (W-3s) for 2001-2003, as well as copies of the beneficiary's Wage and Tax Statements (W-2s) for 2001, 2002, and 2003 showing how much the petitioner paid the beneficiary.

In response, the petitioner, through counsel, provided copies of its 2001 and 2003 corporate tax returns. They contain the following:

	2001	2003
Ordinary Income	\$26,545	\$20,362
Current Assets (Sched. L)	\$21,808	\$34,803
Current Liabilities (Sched. L)	\$19,410	\$24,877
Net current assets (Sched. L)	\$ 2,398	\$ 9,926

Copies of the beneficiary's W-2s for 2003 were provided showing that the petitioner paid him \$21,680. No other years were offered and no W-3s were provided. Counsel's transmittal letter, dated October 5, 2004, states that with regard to the 2001 return, depreciation and bad debts should be added back to income; that officer compensation and property distribution merely represent a corporate tax reduction strategy and should be viewed as funds available to pay the proffered wage; and that the petitioner's gross sales have increased in the period between 2001 and 2003.

The director denied the petition on March 28, 2005. 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 of April 30, 2001. He declined to add back the amounts requested by counsel and noted that the net income and net current assets figures failed to support a finding that the petitioner has had the ability to pay the proffered wage of \$61,651.20.

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

On appeal, counsel urges that non-cash deductions such as depreciation or amortization expenses should be added back to income. Counsel cites two 2002 and one 2001 AAO case where appeals were sustained based on varying factual circumstances using a combination of formulas to find an ability to pay the proffered wage. Counsel attaches a document containing three definitions of “depreciation” by way of illustration. Counsel also urges consideration of the property distribution of \$32,000 taken on line 20 of the 2001 tax return as a sum to be added back to the available funds as well as the \$95,000 in officer compensation as a tax reduction strategy and the replacement of workers evidenced in ‘Salaries and Wages’ of \$124,420 shown on line 8 of the 2001 return.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in maintaining that the petitioner has reasonable expectations of increasing revenue future growth sufficient to justify the petition’s approval.

Regarding counsel’s citation of previous AAO decisions, it is noted that such cases may offer guidance to the review of a current petition under consideration, but they 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 published in bound volumes or as interim decisions.

The AAO does not find that counsel’s unsupported assertions are persuasive in this case in calculating the ability to pay the proffered wage. For example, the assertion that the salaries and wages’ cumulative sum of \$124,420 can somehow be attributable as representing funds available to pay replacement workers, presumably including the beneficiary as a replacement worker, is not supported by any direct evidence in the record. Such undocumented assertions of counsel will not satisfy the petitioner’s burden of proof and do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In determining the petitioner’s ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the 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 a petitioner may have employed an alien beneficiary at a salary less than the proffered wage, appropriate credit will be given. If either a petitioner’s net taxable income or its net current assets can cover any shortfall between actual wages paid and the proffered wage, then the petitioner’s ability to pay a proffered salary is deemed to have been established for a given period. Here, the W-2 issued by the petitioner in 2003, indicates that the beneficiary’s salary of \$21,680 was \$39,971.20 less than the certified wage of \$61,651.20. As noted above, no other evidence of compensation was provided.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable 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). Showing that a

petitioner's gross receipts or gross income exceeded the proffered wage or exceeded a certain level is not sufficient. Gross income will not be considered without also reviewing the expenses incurred in order to produce that 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 depreciation deduction will not be included or added back to the net income. As noted by counsel, this figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may 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 represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, 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.

In the instant case, as shown above, neither the petitioner's ordinary income of \$26,545, nor its net current assets of \$2,398 could cover the proffered wage of \$61,651.20 in 2001. In 2002, the certified wage could not be met by the petitioner's ordinary income of \$2,472 or its net current assets of -\$5,698 in 2002. Similarly, the \$39,971.20 difference between the beneficiary's actual wages and the proffered wage could not be met by either the petitioner's ordinary income of \$20,362 or its net current assets of \$9,926.

While counsel's assertion that *Matter of Sonogawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small net income is correct, that case 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 record contains three corporate tax returns. The documents submitted as evidence of the petitioner's ability to pay the proffered wage do not demonstrate a framework of sufficiently profitable years, from which to conclude that such unusual and unique circumstances exist in this case, which parallel those in *Sonogawa*, or that the level of income shown on the tax returns submitted into the record is somehow uncharacteristically low. In this case, the AAO cannot conclude that the principles enunciated in *Matter of*

Sonegawa justify the approval of this petition based on the evidence submitted. It cannot be concluded that the projection of future profitability overcomes the evidence contained in the record. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

Upon review of the evidence and contentions contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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.