

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass, N.W. Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6



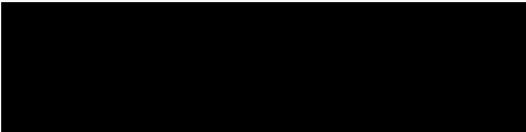
FILE: EAC 04 138 52582 Office: VERMONT SERVICE CENTER Date: FEB 03 2006

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 on appeal. The appeal will be dismissed.

The petitioner is a general contractors construction limited liability company. It seeks to employ the beneficiary permanently in the United States as a stucco mason/applicator. 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.

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, 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. 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 November 5, 2001. The proffered wage as stated on the Form ETA 750 is \$17.99 per hour (\$37,419.20 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 2000, 2001, and 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of

the owners or anyone else.<sup>1</sup> An investor's liability is limited to his or her initial investment. As the owners and others only are obliged to pay a certain portion of those debts should they come due, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

The director denied the petition on August 19, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts there exists evidence of the ability to pay the proffered wage because a charitable donation made by petitioner in 2001 caused it to show diminished taxable income in that year; that the director miscalculated the net current assets of petitioner to its disadvantage; that petitioner has advantage of credit lines and loans; and, that petitioner has sizable cash deposits or reserves.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns<sup>2</sup> demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$37,419.20 per year from the priority date of November 5, 2001:

- In 2001, the Form 1065 stated a taxable income loss<sup>3</sup> of <\$481,754.00>.<sup>4</sup>
- In 2002, the Form 1065 stated a taxable income loss of <\$431,770.00>.

<sup>1</sup> Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

<sup>2</sup> Tax returns submitted for years prior to the priority date, have limited probative value to show the ability to pay the proffered wage. The petitioner's 2000 tax return stated ordinary income of \$1,490,962.00.

<sup>3</sup> IRS Form 1065, Line 22.

<sup>4</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

- In 2003, the Form 1065 stated taxable income of \$518,363.00.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2002 for which the petitioner's tax returns are offered for evidence.

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>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1065 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 17. 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.

Examining the Form 1065 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1065 return stated current assets of \$43,046.00 and \$1,226,990.00 in current liabilities. Therefore, the petitioner had <\$1,183,944.00> in net current assets. Since the proffered wage was \$37,419.20 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1065 return stated current assets of \$623,845.00 and \$1,830,358.00 in current liabilities. Therefore, the petitioner had <\$1,206,513.00> in net current assets. Since the proffered wage was \$37,419.20 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1065 return stated current assets of \$938,713.00 and \$2,090,828.00 in current liabilities. Therefore, the petitioner had <\$1,152,115.00> in net current assets. Since the proffered wage was \$37,419.20 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in her brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>6</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel asserts there exists evidence of the ability to pay the proffered wage because a charitable donation made by petitioner in 2001 caused it to show diminished taxable income in that year. The charitable

---

<sup>5</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.

<sup>6</sup> 8 C.F.R. § 204.5(g)(2).

deduction did not enter into the determination of ordinary income (loss) on the 2001 tax return (Line 22). That charitable deduction appears on Schedules K-1.<sup>7</sup>

Counsel contends that the director miscalculated the net current assets of petitioner to its disadvantage since the director did not take into consideration credit lines, loans and other sources of debt finances. A discussion of the net current assets calculation is found above. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's suggestion that its income could be augmented with a line of credit will not be considered for two reasons. First, since a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset.

However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel asserts that the petitioner has sizable cash deposits or reserves that evidence the ability to pay the proffered wage. Cash deposits are found on Schedule "L" and, as above noted, must be offset by current liabilities. The petitioner has a negative current liability for each year for tax years 2001, 2002 and 2003. Cash is one component of net current assets. The first page of a federal tax return is akin to an income statement that includes the petitioner's net income. The net income is an amount summarizing the petitioner's

---

<sup>7</sup> There are Schedule "K" forms submitted with petitioner's return for each shareholder owners. If a partnership (or "S" corporation) has income from multiple sources other than trade or business, that income is stated on Schedule "K." Similarly, additional deductions such as the charitable donation and income may be included on Schedule "K." In most instances, and as is present on the Schedule "K" statements submitted with the tax returns in this case, the apportioned taxable income of the petitioner as reported on Line 21 is further reduced by deductions taken on each shareholders Schedule "K." Therefore to respond to counsel's contention, while income or loss is "reported out" from petitioner through the Schedule "K" statements, the income can be, and is in the present case, reduced by additional deductions. Therefore, there is no advantage to petitioner through the use of Schedule "K" income or loss figures to determine the ability to pay the proffered wage.

revenues, costs and expenses over time. The tax statement "Schedule L" reflects assets and liabilities on dates certain during the fiscal year. It is used to compose the final summary presented on the income statements as the net income amount. Therefore, to add these two final dollar amounts together from the two pages of the federal tax return essentially double counts the dollar amounts to distort the true representation of the petitioner's finances.

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in a profitable period in 2003. For the years 2001 through 2002, the taxable income loss for the petitioner was <\$481,754.00> and <\$431,770.00> respectively. The net current asset value for years 2001, 2002, and 2003 is negative, <\$1,183,944.00>, <\$1,206,513.00>, and, <\$1,152,115.00>. There is no explanation for the income losses or loss of liquidity (i.e. net current assets) experienced by the petitioner for those years for which tax returns were submitted.<sup>8</sup>

*Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), 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.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonogawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner. Counsel asserts that the one profitable year, cash deposits, credit lines, loans and financings allow the petitioner, despite the negative results mentioned above to pay the proffered wage. An explanation why these items cannot be considered are set forth above. Proof of ability to pay begins on the priority date, that is November 5, 2001, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. By the evidence presented, the petitioner has not proven its ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns for 2001 and 2002 as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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.

---

<sup>8</sup> As stated, the return for 2000 has limited probative value in the determination of the petitioner's ability to pay the proffered wage as of the priority date.

EAC 04 138 52582

Page 7

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.