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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

FEB 03 2006

EAC 03 188 52086

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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:

[REDACTED]

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant specializing in Chinese cuisine. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits:

- A brief; and,
- Assorted printouts of news articles, federal agency and court cases, and copies of documents previously submitted.

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).

Here, the Form ETA 750 was accepted on April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689.60 per year).

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 1946, and to currently employ 10 workers. According to the tax returns in the record, the petitioner's fiscal years lasts from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary claimed to have worked for the petitioner since January 1999.

With the petition, counsel submitted the following documents:

- Counsel's G-28;
- The original certified ETA 750;
- The petitioner's Form 1120 for 2001 and 2002; and,
- Counsel's letter asserting that a downturn in the petitioner's net income was the result of the terrorist attacks of September 11, 2001, which he asserts affected the Washington area economy.

On April 16, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports,

federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested copies of the beneficiary's W-2 Wage and Tax Statements for 2001–2003; and other financial reports for 2001–2003.

In response, on July 12, 2004, the petitioner submitted:

- The beneficiary's W-2 for 2003;
- A copy of the petitioner's Form 1120 for 2003; and,
- Printouts of *Matter of Sonogawa*, 12 I&N Dec. 612 (R.C. 1967); *Masonry Masters, Inc. v. Thornburgh*, 875 F. 2d 898 (D.C. Circ. 1989)

The director denied the petition on September 1, 2004, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts the beneficiary's W-2 for 2003, covering work he performed from November 17, 2003¹ through the end of the year, shows it was paying the beneficiary at the proffered rate of pay. Counsel further cites *Sonogawa*, asserting the ability to pay under the petitioner's overall circumstances; and *Masonry Masters*, asserting the denial was an abuse of discretion; and asserting that the beneficiary is merely filling a vacancy in an existing position for which the petitioner had been paying wages.

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 petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through October 2003. Instead, the petitioner paid partial wages in the amounts of \$3,138.88 during the last quarter of 2003, which is \$21,550.72 less than the annualized proffered wage in 2003. The petitioner is obligated to demonstrate that it could pay the proffered wage. Counsel asserts in the ETA 750 that the petitioner had been working from the priority date but has not documented, through pay stubs, Form 1099 MISC or any other evidence, that the petitioner paid the beneficiary any amount. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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).

¹ Counsel asserts that the petitioner put the beneficiary on the payroll on November 17, 2003, when counsel states the beneficiary "received his social security card."

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,689.60 per year from the priority date.

In 2001, the Form 1120 stated net income² of -\$33,582.

In 2002, the Form 1120 stated net income of \$27,242.

In 2003, the Form 1120 stated net income of \$15,666.

Therefore, for the years 2001, the petitioner did not have sufficient net income to pay the proffered wage, and for 2001; and 2003, the petitioner did not have sufficient net income to pay \$21,550.72, which is the difference between the wage paid and the proffered wage. For 2002, the petitioner did have sufficient net income to pay the 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.

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 year in question, were as follow:

<u>Tax Year</u>	<u>Net Current Assets At Year's End</u>	<u>Surplus (Deficit) To Pay Proffered Wage</u>
2001	-\$15,438	(\$40,127.60)*
2003	-\$12,346	(33,896.72)**

* The full proffered wage, since no wage payments were made to the beneficiary in 2001.

** Crediting the petitioner with the \$3,138.88 actually paid to the beneficiary in 2003.

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 for 2001, nor the difference between the wage paid and the proffered wage for 2003, as of the priority date, either through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel asserts in his appeal brief that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that the petitioner has established its ability to pay the proffered wage, under the totality of circumstances of *Sonegawa*. Counsel cites *Masonry Masters, Inc.* for the proposition that it is an abuse of discretion for the agency to deny the petition when the petitioner has demonstrated its ability to pay the proffered wage.

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

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.

Sonegawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. 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. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if the losses during some years and very low profits during others are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses might be overlooked in determining ability to pay the proffered wage. Here, the record of proceedings does not an evidentiary framework from which to decide if the petitioner's net income for 2001 and 2003 were uncharacteristic for the petitioner. The petitioner, while not a new business, had not demonstrated that it has ever posted a large profit. To assume that the petitioner's business will flourish, with or without hiring the beneficiary, is to speculate.

Counsel does not specify how *Masonry Masters* supports the petitioner's claim. Although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds. The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage. Further, the holding in *Masonry Masters* does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns.

While that *Masonry Masters* decision urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary will generate income and to guess at the amount. If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no evidence that the net income generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

In that case the judge faulted the legacy Immigration and Naturalization Service for, without explanation, approving one of that petitioner's I-140 petitions while at the same time denying a nearly identical petition by the same petitioner. The instant appeal presents no similar set of facts or assertions, and accordingly, counsel's assertions are not persuasive.

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.

Counsel advises that the beneficiary will replace an existing worker. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. 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 the existing workers involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

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.