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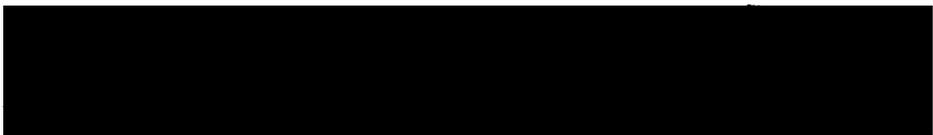
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Office: CALIFORNIA SERVICE CENTER

Date: JAN 23 2006

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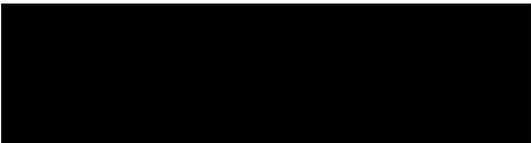
Petitioner:



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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home care and board-and-care service. It seeks to employ the beneficiary permanently in the United States as an administrator-financial officer. 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;
- A transcript of statements by [REDACTED] Association Director, Operations, at the annual convention of the American Immigration Lawyer's Association in Philadelphia in June 2004;
- The beneficiary's W-2 Wage and Tax Statements the petitioner issued for 2000-2002;
- The beneficiary's pay stubs from April 11, 2004 through July 25, 2004;
- The petitioner's Form DE-6 Quarterly Wage reports from July 2000, through September 30, 2003;
- Bank statements for the petitioner's bank accounts from January 1, 2002, through May 28, 2004.

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 July 10, 2000. The proffered wage as stated on the Form ETA 750 is \$31.73 per hour (\$66,000 per year).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$450,000, and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal years last from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on June 5, 2000, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- Counsel's G-28;

- An approved ETA 750; and,
- The petitioner's Form 1120S returns for 1999–2001.

On February 24, 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 the petitioner's income tax returns for 2002 and 2003, and its DE-6 Quarterly Wage Reports for all of 2-002 and 2003.

In response, the petitioner submitted:

- An application for extension for filing the petitioner's form 1120S for 2003;
- The petitioner's Form 1120S return for 2002;
- DE-6 Forms for 2003 (4<sup>th</sup> quarter report missing) and for 2002 (3<sup>rd</sup> quarter report missing); and,
- The petitioner's bank statements from January 1, 2002 to February 27, 2004.

The director denied the petition on June 7, 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 that the appeal should be sustained despite the petitioner's federal income tax returns, which show a lack of ability to pay the proffered wage. Counsel asserts that the cited Yates transcript should lead Citizenship and Immigration Services (CIS) to base their decisions adjudicating employment-based, skilled worker immigrant petitions upon the bona fides of the employer rather than a strict application of the ability-to-pay standard. Counsel also states that the petitioner payment of wages to the beneficiary demonstrates its ability to pay the proffered wage. Counsel finally asserts that the petitioner's monthly bank statements demonstrate its ability to pay the proffered wage because the statement balances exceed the \$5,500 per month amount of the proffered wage.

Counsel's assertion that this office must adhere to the guidance contained in the transcript of [REDACTED] is not persuasive. It is noted that discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

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. In the instant case, the petitioner established that it employed and paid the beneficiary \$26,775 in 2000, \$27,645 in 2001, and \$8,400 in 2002. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through 2002. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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.

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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$66,000 per year from the priority date.

In 2002, the Form 1120S stated net income<sup>1</sup> of -\$13,206.

In 2001, the Form 1120S stated net income of \$30,659.

In 2000, the Form 1120S stated net income of -\$27,771.

Therefore, for the years 2000 through 2002, based upon its federal income tax returns, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and 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. CIS will next 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>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

<sup>1</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>2</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 2000 were -\$22,411; during 2001 were \$19,180; and during 2002 were \$13,890.

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 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 states that its monthly bank statements demonstrate its ability to pay the proffered wage.

The record prior to the decision of the director covers the period from January 1, 2002 to February 27, 2004, and that on appeal extends the period to May 28, 2004. The closing balances do not indicate that the petitioner was accumulating cash in amounts that would have been sufficient to pay the proffered wage.

The annual proffered wage of \$66,000 is equal to \$5,500 per month. In all of the months for which statements were submitted, the closing balances were greater than the monthly proffered wage. However, monthly closing balances on bank statements do not represent new funds each month, but rather show the amount of the petitioner's cash reserve remaining after expenditures. If the cash reserve were used in a given month to pay the monthly wage of the beneficiary, the balance in every succeeding month would then be lower by that amount. Moreover, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Finally, counsel asserts that the director "failed to view the prospective U.S. employer's overall financial wherewithal to pay the proffered wage in a pragmatic and realistic (or "real world") light." Such reasoning is similar to that used in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Sonogawa*, 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 *Sonogawa* 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 in that case had suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonogawa*, 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.

Here, by contrast, the petitioner had been in business only three years as of the priority date, reporting net losses in two of the four years for which counsel submitted its federal income tax returns. *Sonegawa* would only apply if the losses during some years were uncharacteristic, given a framework of profitable or successful years. With so few years available for comparison, the petitioner cannot be heard to suggest that its losses might be overlooked in determining ability to pay the proffered wage. The petitioner is a new business, and has never posted a large profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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.