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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: JUL 06 2006

EAC 04 223 52247

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a tailor/shirtmaker. It seeks to employ the beneficiary permanently in the United States as a master tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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, counsel submitted a brief.

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 granting 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 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 \$11.68 per hour, which equals \$24,294.40 per year.

On the petition, the petitioner stated that it was established on June 1, 1995 and that it employs four workers. The petition states that the petitioner's gross annual income is \$200,278 and that its net annual income is \$81,754.¹ On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have

¹ Reference to the petitioner's 2001 tax return indicates that the petitioner characterized its Line 6 Total income as its net income.

worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Framingham, Massachusetts.

In support of the petition, counsel submitted copies of the petitioner's 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation and an undated letter from the petitioner's accountant to the petitioner's owner. The petitioner's tax returns show that it is a corporation, that it incorporated on June 1, 1996, and that it reports taxes pursuant to the calendar year and accrual accounting.

The 2001 return shows that the petitioner declared ordinary income of \$10,650 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002 return shows that the petitioner declared ordinary income of \$14,467 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$8,164 and current liabilities of \$5,500, which yields net current assets of \$2,664.

The 2003 return shows that the petitioner declared ordinary income of \$29,968 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$41,815 and current liabilities of \$5,553, which yields net current assets of \$36,262.

The accountant's undated letter states,

[The petitioner] has seen significant growth the past two years. Sales have grown 17% and 35% in 2000 and 2001, respectively. The company has shown profits in each of its past two years. The 2002 tax returns have not been completed due to the calendar year still being in progress.² At this point, it is premature to determine the profit obtained in 2002. The deposits in 2002 appear to be consistent with 2001, per discussion with the [petitioner's] management, and the 2002 holiday season appears to be stronger than the prior year. Most retailers have seen improvement over the past month.

Reference to the petitioner's tax returns shows that the petitioner's gross receipts were \$200,278, \$181,038, and \$280,722 during 2001, 2002, and 2003, respectively. Thus, from 2001 to 2002 the petitioner suffered a drop in its gross receipts of approximately 10%, whereas from 2002 to 2003 the petitioner enjoyed an increase of approximately 55% in its gross receipts. The provenance of the accountant's figures, stating that the petitioner had a 17% increase in sales during 2000 and a 35% increase during 2001 is unknown to this office. The tax returns do not appear to support that statement and no other evidence in its support is in evidence. Given the unsubstantiated information upon which they are based the accountant's conclusions about the petitioner's current and projected financial condition will not be accorded evidentiary weight.

² Although the exact date of that letter is unknown the accountant states that the letter was written during 2002. Both the 2002 return and the 2003 return provided with the petition. The information on that letter was not, therefore, current when the petitioner filed the instant Form I-140 petition on July 26, 2004.

The acting 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 and, on November 23, 2004, denied the petition.

On appeal, counsel submitted a brief. Counsel again asserts that the petitioner's sales have grown 17% from 2001 to 2002, and 35% from 2002 to 2003. Again, counsel does not cite the figures from which those statistics are derived.

Counsel cites the petitioner's Cost of Labor during various years as another fund available to pay the proffered wage to the beneficiary. Counsel does not assert, and certainly does not demonstrate, that those wages were paid for performance of the duties of the proffered position.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the fact that a petitioner suffers losses or low profits during a given year does not automatically render an alien worker petition unapprovable. Counsel also cites *Sonogawa* for the proposition that if the petitioner can demonstrate a reasonable expectation of continued increase in business and profits then it has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Sonogawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity 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 *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 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 couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that, with or without hiring the beneficiary, and notwithstanding its poor performance during 2001 and 2002, the petitioner's business will flourish is speculative.

The petitioner asserts that the Cost of Labor shown on Line 3, Schedule A of its 2001 and 2002 tax returns are funds available to pay the proffered wage. The evidence does not demonstrate, however, what portion, if any, of those amounts were paid to contractors for performing the duties of the proffered position. If those payments were for the performance of other essential duties, then they were not available to pay the proffered

wage. The petitioner has not demonstrated that any portion of those funds was available to pay the proffered wage and they will not be further considered.³

Further, even if the petitioner had demonstrated, rather than alleged, that it paid contractors to do the work that the beneficiary would do, it did not state the hourly wage those contractors were paid. Without that information no calculation can be performed to demonstrate the amount of the contract labor payments that would be obviated by hiring the beneficiary full-time.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be

³ Further, even if they were shown to have been available to pay the proffered wage, the petitioner's Schedule A, Line 3 Cost of Labor during 2002 was only \$6,996. Even if added to the petitioner's net profit during that year, that amount would be insufficient to show that the petitioner was able to pay the proffered wage.

viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁴ shown on lines 16(d) through 18(d). If a corporation's 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$24,294.40. The priority date is April 30, 2001.

During 2001 the petitioner declared ordinary income of \$10,650. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to pay the proffered wage during that year. The petitioner has not, therefore, demonstrated that it was able to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$14,467. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$2,664. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to pay the proffered wage during that year. The petitioner has not, therefore, demonstrated that it was able to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$29,968. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated that it was able to pay the proffered wage during 2003.

The Form I-140 petition in this matter was submitted on July 26, 2004. On that date the petitioner's 2004 tax return was unavailable. The petitioner is excused from demonstrating the ability to pay the proffered wage during 2004 and subsequent years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.