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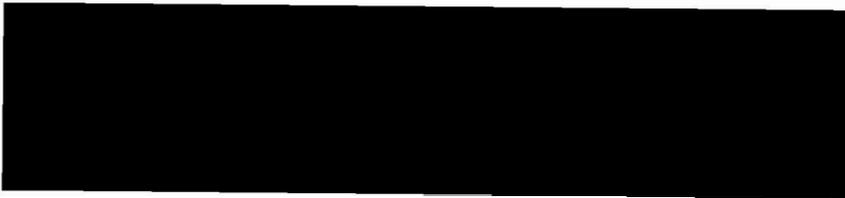
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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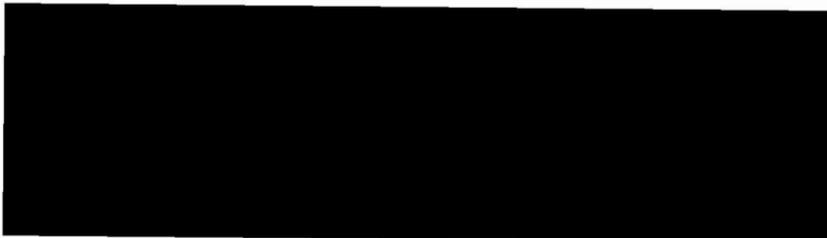


IN RE: Petitioner:
Beneficiary:



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.

A handwritten signature in black ink, appearing to read "Michael Valdes".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska 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 sandwich shop. It seeks to employ the beneficiary permanently in the United States as a manager. 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 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 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.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$34,341 per year.

On the petition, the petitioner stated that it was established on February 22, 1999. The petitioner did not state the number of workers it employs in the space reserved for that purpose. The petition states that the petitioner's gross annual income is \$225,000 and that its net annual income is \$45,000. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Collinsville, Illinois.

In support of the petition, counsel submitted copies of the petitioner's 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation. Those returns show that the petitioner is a corporation, that it incorporated on February 8, 1999, and that it reports taxes pursuant to cash convention accounting and the calendar year.

In a letter submitted with the petition counsel stated that the petitioner's owner owns other businesses in addition to the petitioning sandwich shop and "has the freedom to transfer funds from one business to another should he need to do so.

The 2001 return shows that the petitioner declared a loss of \$55,687 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 a loss of \$31,040 as its ordinary income 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 2003 return shows that the petitioner declared ordinary income of \$44,623 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 petitioner's 2004 return shows that the petitioner declared ordinary income of \$45,138 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 acting director determined that the evidence submitted did not establish that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date and, on September 21, 2005, denied the petition.

On appeal, counsel submits (1) the tax returns of corporations other than the petitioner and an analysis of figures from those tax returns, (2) a letter dated September 16, 2005 an accountant, and (3) a brief.

The September 16, 2005 accountant's letter states that the petitioner's owner has had the continuing ability to pay the proffered wage beginning on the priority date. In support of that conclusion the accountant cites the amount of the petitioner's depreciation deductions and income of the petitioner's owner's other businesses.

In the brief counsel argues that the petitioner's owner has always been able to extract funds from his other businesses as necessary to fund the petitioner. Counsel further states that the petitioner's losses were largely the result of depreciation deductions, and that those deductions represent funds available to pay wages. Counsel further notes that the petitioner paid \$11,700 and \$32,200 in officer compensation to its owner during 2001 and 2002, respectively. Finally, counsel asserts that the petitioner's owner intends to forego that compensation after he is able to hire the beneficiary.

Counsel notes that 8 C.F.R. § 204.5(g)(2) does not concretely state how evidence should be analyzed to determine whether it demonstrates a petitioner's ability to pay the proffered wage. Counsel further notes that such concrete guidance was provided in a May 4, 2004 memorandum from the Associate Director for Operations of CIS, but asserts that this guidance was withdrawn in another memorandum that was issued on February 16, 2005. Counsel states that case law indicates that a "totality of circumstances" test should be applied to the petitioner's ability to pay the proffered wage, specifically citing *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The assertions of counsel and the accountant that the petitioner's owner's income and assets are available to pay the proffered wage are unconvincing. The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner, including his ownership in other corporations and his income from them, shall not be further considered.

The arguments of counsel and the accountant that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage are similarly unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to 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 is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel and the accountant assert that they should not be charged against income according to their depreciation schedule, they do not offer any alternative allocation of those costs.¹ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

Counsel urges that the Compensation of Officers that the petitioner paid to its owner during the salient years need not have been paid, but could have been retained by the petitioner to pay the proffered wage. Counsel adds that the petitioner intended to cease paying that compensation to its owner as soon as it was able to hire the beneficiary.

¹ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

The only indication in the record that supports those assertions is counsel's own statement. Counsel's assertions are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

The record contains no evidence to support the supposition that the petitioner's owner was able and willing to forego compensation, in whole or in part, to pay the proffered wage. The compensation that the petitioner paid to its owner has not, therefore, been shown to have been available to pay wages.

The first page of the February 15, 2005 memorandum cited by counsel states that the memorandum of May 4, 2004 is rescinded. The remaining five pages of that memorandum appear to indicate that the withdrawal was meant to affect only the portion of the earlier memorandum that pertained to whether a request for evidence or notice of intent to deny should be issued, rather than the portion pertinent to the various ways in which a petitioner may demonstrate its ability to pay the proffered wage. Because the February 15, 2005 memorandum explicitly states that the memorandum of May 4, 2004 is withdrawn, though, this office will regard the earlier memorandum as withdrawn for the purpose of adjudicating the instant case. The guidance in the earlier memorandum, however, is a fairly accurate description of the policy then existing in this office pertinent to demonstrating ability to pay the proffered wage. The issuance of that memorandum did not change this office's policy, nor did its rescission. This office is free to find the reasoning underlying that memorandum persuasive and the various tests described therein compelling.

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 established that it employed the beneficiary beginning in January of 2005 and continuing until at least March 28, 2005, and that during the period from January to March 2005 the petitioner paid her \$9,675.

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 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.

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 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 typically² 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.

CIS does apply a totality of circumstances test to the petitioner's continuing ability to pay the proffered wage beginning on the priority date in some instances. Counsel's citation of *Matter of Sonogawa, supra*, for the proposition that a totality of circumstances test must be applied in the instant case, however, is unconvincing. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more 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 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, rather than that 2003 and 2004 were

² The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

uncharacteristically profitable.³ Here, assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The proffered wage is \$34,341 per year. The priority date is April 27, 2001.

During 2001 the petitioner declared a loss of \$55,687. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net income. The petitioner ended the year with negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has provided no persuasive evidence of any other funds available to the petitioner during 2001 with which it could have paid the proffered wage. The petitioner has failed to demonstrate the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss of \$31,040. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net income. The petitioner ended the year with negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has provided no persuasive evidence of any other funds available to the petitioner during 2002 with which it could have paid the proffered wage. The petitioner has failed to demonstrate the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$44,623 during that year. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared ordinary income of \$45,138 during that year. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The petitioner has demonstrated that it paid \$9,675 to the beneficiary during 2005. The petitioner might ordinarily be obliged to demonstrate the ability to pay the \$24,666 balance of the proffered wage during that year. The petition in this matter, however, was submitted on September 6, 2005. On that date the petitioner's 2005 tax return was unavailable. No request for additional evidence was issued. The appeal in this matter was submitted on October 17, 2005. On that date the petitioner's 2005 tax return remained unavailable. Under these circumstances the petitioner is excused from demonstrating its ability to pay the proffered wage during 2005.

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.

³ The petitioner might have submitted its 1999 and 2000 tax returns, in addition to its 2003 and 2004 tax returns, to support the proposition that 2001 and 2002 were uncharacteristically unprofitable.