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**U.S. Citizenship
and Immigration
Services**

B6



FILE:

Office: TEXAS SERVICE CENTER Date: **JUL 27 2006**

SRG-05 182 51803

IN RE:

Petitioner:

Beneficiary:



PETITION:

Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a Montessori school. It seeks to employ the beneficiary permanently in the United States as a teacher's assistant. 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.

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 April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$12.91 per hour (\$26,853 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 1981, to have a gross annual income of \$626,848, and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year lasts from September 1 to August 31. On the Form ETA 750B, signed by the beneficiary on April 6, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- An original certified ETA 750;
- An internally audited financial statement for the period ended February 28, 2005; and,
- The petitioner's Form 1120 for its fiscal years ending on August 31 in the years 2002-2004.¹

¹ The record does not contain a tax return covering the priority date, which occurred during the petitioner's fiscal year ending August 31, 2001.

On July 19, 2005, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director, noting the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage for the years 2001–2003, specifically requested that the petitioner provide such evidence for the year 2004 and for the first half of 2005.

In response, the petitioner submitted:

- The petitioner's Form 941 for all quarter in the year 2004 and the first half of the year 2005;
- The petitioner's bank statements for the year 2005;
- The petitioner's CPA compiled financial statement through the end of July 2005;

The director denied the petition on October 19, 2005, 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 submits the following additional documents:

- The petitioner's Form 941 for the years 2001–2005;
- A November 7, 2005 letter from the petitioner's bank stating that the balance remaining on its mortgage loan is \$63,895.66;²
- The petitioner's monthly bank statements for the years 2001–2005;
- A spreadsheet representing that the petitioner's 2004 and 2005 monthly bank statements showing end balances ranging between \$18,927 and \$82,436 for 2004, and ranging between \$20,611 and \$77,983 for January–October 2005, with monthly averages as follows:

<u>Year</u>	<u>Monthly Average</u>
○ 2005	\$47,866
○ 2004	\$48,538
○ 2003	\$28,631
○ 2002	\$28,681
○ 2001	\$30,822

- The petitioner's Form 1120 for its fiscal year ending in 2005 stating net income on line 28 of \$2,882; and,
- Tithe beneficiary's 2005 pay stubs from July 2005 at the proffered wage rate.

On appeal, counsel asserts the director erred by failing to consider the totality of the petitioner's financial circumstances, citing *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), asserting that its wages and salaries grew between 2001 and 2004 as did receipts for the year 2004 despite a decline in receipts for 2001–2003. Counsel also cites certain non-precedent decisions of the AAO that acknowledge the practice of minimizing net income on tax returns for tax avoidance reasons. Counsel also asserts that the director must consider a prospective employer's assets when determining its ability to pay the proffered wage, citing *Matter of Ranchito Coletero*, 2002-INA-104 (2004 BALCA).

² In his brief counsel notes that the petitioner's tax returns estimate the mortgaged property is worth more than \$163,000, implying the property's net value is approximately \$100,000.

Ranchito Coletero held that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

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 the present.

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 \$26,853 per year from the priority date.

- For the petitioner's fiscal year ending August 31, 2002, the amended Form 1120 stated net loss of (\$2,936).⁴
- For its fiscal year ending August 31, 2003, the Form 1120 stated net loss of (\$5,403).
- For its fiscal year ending August 31, 2004, the Form 1120 stated net loss of (\$2,001).

Therefore, for the petitioner's fiscal years ending in 2002, 2003 and 2004, the petitioner did not have sufficient net income to pay the proffered wage. For its fiscal year ending on August 31, 2002, covering the priority date, the record does not contain evidence of the petitioner's net income.

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. We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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.⁵ 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 were as follows:

Fiscal Year Ending	Net Current Assets	minus Proffered Wage	equals Surplus/ (Deficit)
2002	(\$64,688)	\$26,788.80	(\$91,540.80)
2003	(\$60,735)	\$26,788.80	(\$87,587.80)
2004	(\$34,778)	\$26,788.80	(\$61,630.80)

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.

⁴ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

⁵ 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.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that the totality of the petitioner's financial circumstances demonstrates its ability to pay the proffered wage, citing *Matter of Sonogawa*.

On appeal, counsel submitted the petitioner's financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. A compilation is the management's representation of its financial position and is the lowest level of financial statements relative to other forms of financial statements. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel further asserts the record establishes its ability to pay by virtue of the petitioner's submitted bank statements.

Counsel's reliance on the ending balances in the petitioner's bank account 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, used above in determining the petitioner's net current assets. Fourth, the bank statements do not cover the entire period continuously from the priority date.

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.

Counsel's assertions concerning the totality of circumstances of the petitioner's financial strength, its size, longevity, and number of employees, cannot be overlooked, however. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall

magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1981 and employs approximately 15 employees. The petitioner's gross income appears to have remained at approximately \$600,000 or more since September 1, 2001, and it has paid salaries and wages each year, according to its Form 941s, of between \$196,165 in 2005 and \$303,140 in 2001. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

We conclude that counsel's assertions on appeal 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 establishes 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 met that burden.

ORDER: The appeal is sustained. The petition is approved