

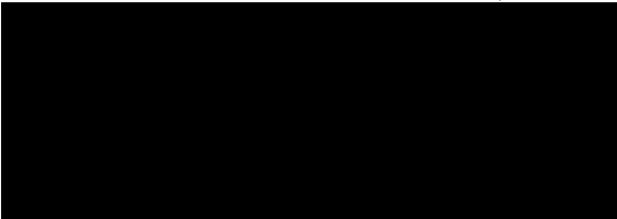


U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: JUL 27 2006

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, Vermont Director, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a fast food store. It seeks to employ the beneficiary permanently in the United States as a doughnut maker. 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. The director denied the petition accordingly.

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 the granting of 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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. 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour (\$21,840.00 per year<sup>1</sup>). The Form ETA 750 states that the position requires six months of experience.

On appeal, counsel submits a legal brief and additional evidence.

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<sup>1</sup> Based upon a 35 hr/week, that is 1820 hours.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a U.S. Internal Revenue Service Form tax return; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on June 13, 2003, additional pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested that the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statement for 2001.

In response to the request for evidence, counsel submitted copies of the following documents: the beneficiary's W-2 Wage and Tax Statement for 2001; letters dated August 6<sup>th</sup> and 25<sup>th</sup>, 2003; a financial statement for a period term that is obscured on the faint copies; the petitioner's 2002 U.S. federal tax return; and, an explanatory letter.

The director denied the petition on October 7, 2003, finding that the evidence submitted 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 loss suffered by the petitioner in 2001 was "a false indication of the company's ability to pay" since the business in that location went through a three month renovation that "... interrupted [the facility closed from February to April 2001] ... the operation of the business for three months and reduced annual revenues while increasing annual costs."

Counsel also asserts that the discrepancy in employment dates for the beneficiary mentioned by the director was because beneficiary worked at another location also owned by the petitioner. (The G-325A Form referred to by the director was subsequently amended to reflect this statement, and, it is attached as an exhibit upon appeal.)

Counsel cites and relies upon the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967)... Counsel contends upon appeal that "... the year 2001 was abnormally unprofitable for the company due to the fact that the company's store was closed for three months and did not produce any revenues for that period ... " while at the same time, "... the company expended significant funds to renovate the store." Counsel offers two letters dated August 6<sup>th</sup> and 25<sup>th</sup>, 2003, and, a financial statement support this statement.

Counsel has submitted the following documents to accompany the appeal statement: U.S. Internal Revenue Service Form tax returns for the years 1999, 2000, 2001 and 2002; an asset summary; a contractor's invoice; and the beneficiary's W-2 Wage and Tax Statement.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary. In 2001, the petitioner paid the beneficiary \$1,725.00.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. 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 v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The tax returns<sup>2</sup> demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$21,840.00 per year from the priority date of April 24, 2001:

- In 2001, the Form 1120S stated taxable income loss of <\$10,251.00>.<sup>3</sup>
- In 2002, the Form 1120S stated taxable income of \$46,095.00.

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.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage in 2001 for which the petitioner's tax returns are offered for evidence.

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.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

<sup>2</sup> Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. However, in the particular factual circumstances of the case, counsel has submitted what may be termed as historical information to show over time the viability of the petitioner's business. In 1999, the Form 1120S stated taxable income of \$67,217.00. In 2000, the Form 1120S stated taxable income of \$34,022.00.

<sup>3</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

<sup>4</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner,<sup>5</sup> Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$34,452.00 and \$99,726.00 in current liabilities. Therefore, the petitioner had <\$65,274.00> in net current assets. Since the proffered wage is \$21,840.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$7,995.00 and \$72,052.00 in current liabilities. Therefore, the petitioner had <\$64,057.00> in net current assets. Since the proffered wage is \$21,840.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2002 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

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. According to regulation,<sup>6</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel asserts that the loss suffered by the petitioner in 2001 was "a false indication of the company's ability to pay" since the business in that location went through a three-month renovation that "...interrupted [the facility closed from February to April 2001] ... the operation of the business for three months and reduced annual revenues while increasing annual costs." Counsel cites and relies upon the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967)... Counsel contends upon appeal that "... the year 2001 was abnormally unprofitable for the company due to the fact that the company's store was closed for three months and did not produce any revenues for that period ..." while at the same time, "... the company expended significant funds to renovate the store." Counsel points out that letters dated August 6<sup>th</sup> and 25<sup>th</sup>, 2003, and, a financial statement support this statement.

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in a profitable period from 1999, 2000 and 2003. For those years, the petitioner's taxable income was \$67,217.00, \$34,022.00, and \$46,095.00 respectively. The petitioner did have sufficient taxable income to pay the proffered wage of \$21,840.00 per year in 2003. In 2001, the petitioner had insufficient taxable income or net current assets to pay the proffered wage. In 2001 the petitioner suffered a taxable income loss of <\$10,251.00> and a negative net current assets figure of <\$65,274.00> in 2001.

*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

<sup>5</sup> In 1999, petitioner's Form 1120S return stated current assets of \$62,894.00 and \$14,206.00 in current liabilities. Therefore, the petitioner had <\$48,688.00> in net current assets. In 2000, petitioner's Form 1120S return stated current assets of \$70,791.00 and \$27,190.00 in current liabilities. Therefore, the petitioner had <\$43,601.00> in net current assets.

<sup>6</sup> 8 C.F.R. § 204.5(g)(2).

\$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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Unusual and unique circumstances have been shown to exist in this case to parallel those in *Sonegawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner. Counsel asserts that "the year 2001 was abnormally unprofitable for the company due to the fact that the company's store was closed for three months and did not produce any revenues for that period' while at the same time, "... the company expended significant funds to renovate the store." The evidence submitted by counsel supports his contention (i.e. letters dated August 6<sup>th</sup> and 25<sup>th</sup>, 2003 from the petitioner and the petitioner's contractor, the corroborative data in a financial statement as well as the 2001 tax return).<sup>7</sup>

Therefore, by the evidence presented, the petitioner has proven its ability to pay the proffered wage beginning on the priority date.

The petitioner has demonstrated its ability to 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 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.

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<sup>7</sup> In summary, Counsel submitted a letter from Allied Domecq stating that the facility was closed for February, March, and April of 2003, with a letter recounting the same closure from the owner. Also, the financial statement, while not audited or acceptable as evidence under the regulation stated above of the ability to pay the proffered wage, is corroborating evidence of a one-time taxable income short-fall and an increase operating expense due to store closure and renovation in 2003.