

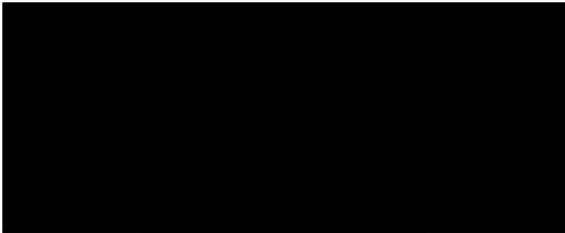


U.S. Citizenship
and Immigration
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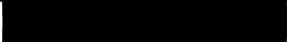
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FILE:



Office: VERMONT SERVICE CENTER

Date: MAR 03 2006

EAC 04 113 50467

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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.

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 the granting of 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, 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 4, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689.60 per year). The Form ETA 750 states that the position requires two years experience.

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; U.S. Internal Revenue Service Form tax returns for 2001 and 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

With the Forms I-485 application for adjustment and I-765 Application for Employment Authorization, counsel submitted the beneficiary's pay statements.

The director denied the petition on August 18, 2004, 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 director has not fully evaluated the evidence, and, that the petitioner continues in business with its gross revenues up year-to-year.

With the appeal, counsel submits U.S. federal tax returns for 2002 and 2003. On January 18, 2006, counsel submitted additional copies of the following documents as evidence of the ability to pay the proffered wage: an explanatory letter from the petitioner's accounting firm dated September 17, 2004; a W-2 Wage and Tax Statement for 2003; and, a "History Report" for the beneficiary detailing her wages in 2004.

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 at the rate of \$9.00 per hour (indicates \$18,720.00 per annum in 2001) and at the rate of approximately \$12.00 per annum (indicates \$24,960.00 per annum in 2003).¹ A W-2 Wage and Tax Statement for 2003 was submitted stating wages paid of \$24,607.26. The above mentioned "History Report" stated gross pay for 2004 of \$18,422.40 (40 payments).

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 returns² demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,689.60 per year from the priority date of April 4, 2001:

- In 2001, the Form 1120 stated taxable income of \$3,049.00.
- In 2002, the Form 1120 stated taxable income of \$3,885.00.
- In 2003, the Form 1120 stated taxable income of \$36,113.00.

¹ Pay statements were submitted for 12/18/2000 to 12/24/2000; 02/19/2001 to 02/25/2001. Eight pay statements in 2003 were submitted that stated on the statement dated 07/25/2003 wages paid "year-to-date" of \$14,171.58.

² Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. In 2000, the petitioner stated tax income of \$11,023.00.

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.

- A W-2 Wage and Tax Statement for 2003 was submitted stating wages paid of \$24,607.26. Since the proffered wage is \$24,689.60 per year, this amount is near to the proffered wage amount.

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 at any time between the years 2000 through 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.³ 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 1120 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.

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

- In 2001, petitioner's Form 1120 return stated current assets of \$35,593.00 and \$105,378.00 in current liabilities. Therefore, the petitioner had <\$69,785.00>⁴ in net current assets. Since the proffered wage is \$24,689.60 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of \$31,890.00 and \$93,232.00 in current liabilities. Therefore, the petitioner had <\$61,342.00> in net current assets. Since the proffered wage is \$24,689.60 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120 return stated current assets of \$41,262.00 and \$113,116.00 in current liabilities. Therefore, the petitioner had <\$71,854.00> in net current assets. Since the proffered wage is \$24,689.60 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 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.

³ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ 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.

Counsel on appeal asserts that the director has not fully evaluated the evidence, and, that the petitioner continues in business with its gross revenues up year-to-year. Petitioner's accountant states in the letter mentioned above that the beneficiary received more than the proffered wage in 2004.

Further, the accountant stated that 70% of the current liabilities of petitioner is owed to a related party entity, Services Aby Inc. and that therefore "such repayment schedule may be varied." The accountant determines current liabilities, and then current net assets, by disallowing the debt obligation it values at \$78,585.30, to calculate a positive net current asset figure. Contrary to counsel's primary assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel contends that officer compensation may be available to pay the proffered wage. It is not an uncommon practice for a petitioner's sole owner/stockholder (or, in certain cases, joint stockholders) to take the corporation's income and compensate them with it, thus sheltering it from corporate additional taxation. The amount of officer compensation is greater than the proffered wage in all of the pertinent years. A significant difference makes it easier to believe that the officer compensation could have been adjusted to pay the wage. In years 2003, 2002, and 2001, officer's compensation was \$61,700.00, \$130,825.00, and \$167,920.00. The amount of officer compensation does vary over the course of the pertinent years demonstrating that the amount does not represent some contractually obligated and fixed amount of compensation. The officer receiving the compensation is the sole owner/stockholder or majority owner/stockholder, lending credence to the argument that the officer had the discretion to set his or her own compensation. As is discussed below, the totality of the circumstances, other information in the record) supports the fact that the petitioner is a profitable enterprise.

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 in 2001, 2002 and 2003. For the years 2001 through 2002, the taxable income for the petitioner increased from \$3,049.00 to \$36,113.00. The net current asset value for those years is negative but since it is owed to an affiliated entity the chance of a default under the note is remote. The petitioner has paid the beneficiary \$24,607.26 in 2003, and, \$18,422.40 for less than a full year in 2004, but at a rate equating to the proffered wage.

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 *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. By the evidence presented, the petitioner, while a going concern, is not a viable business that has proved its ability to pay the proffered wage.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions are supported by the evidence presented in the corporate tax returns and wage statements as submitted by petitioner that shows that 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.