

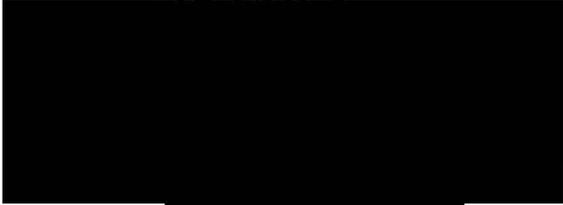


U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 03 135 52396

Office: VERMONT SERVICE CENTER

Date: MAR 24 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Other 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, 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retirement home. It seeks to employ the beneficiary permanently in the United States as a cleaner, housekeeping. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. 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.

On appeal, counsel submits additional evidence.

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 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on November 7, 1997. The proffered salary as stated on the labor certification is \$578.68 per week or \$30,091.36 per year.

With the petition, counsel submitted a letter from the petitioner stating that it had the ability to pay the proffered wage as of the date of filing of the application for labor certification, a copy of the petitioner's 1997 Form 1120, U.S. Corporation Income Tax Return, and a copy of a compiled financial statement for the year ended December 31, 2001. The petitioner's 1997 tax return reflected a taxable income before net operating loss deduction and special deductions or net income of \$9,394 and net current assets of -\$99,951. The 2001 compiled financial statement reflected a net income of \$6,336 and net current assets of -\$162,964. The director determined that the evidence submitted was insufficient to establish the petitioner's continuing ability to pay the proffered wage, and, on April 8, 2004, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. The director specifically requested copies of the petitioner's 1998 through 2003 U.S. federal income tax return(s) with all schedules and attachments, copies of the beneficiary's

2001 through 2003 Forms W-2, Wage and Tax Statements, if the petitioner employed the beneficiary during those years, copies of annual reports for the years in question, that are accompanied by audited or reviewed financial statements, and a statement from a financial officer of the organization that establishes the petitioner's ability to pay the proffered wage. The petitioner was informed that it could submit supplementary evidence to establish the employer's ability to pay the proffered wage, such as accredited profit/loss statements, bank account records, or personnel records.

In response, counsel submitted a letter from _____ Certified Public Accountant (CPA), asserting that the petitioner's depreciation is a non-cash expense and should be added back to the net income from operations, that there are no rental expenses, that since the officers are also the stockholders, payment of the loan owed to the stockholders can be postponed if other financial needs arises, and that prepaid rent and security deposits by the residents, that must be refunded to a resident when he leaves the facility, are not considered material liabilities since the amount refunded is immediately replaced by payment of a new replacement-resident. Counsel also submitted a copy of a reviewed balance sheet for the petitioner for the year ended December 31, 2003, and copies of the petitioner's 1997, 2001 and 2002 Forms 1120. The petitioner's 1997 tax return was previously discussed, and the petitioner's 2001 tax return reflected a taxable income before net operating loss deduction and special deductions or net income of \$9,071 and net current assets of -\$83,564. The petitioner's 2002 tax return reflected a taxable income before net operating loss deduction and special deductions or net income of \$23,231 and net current assets of -\$52,264.

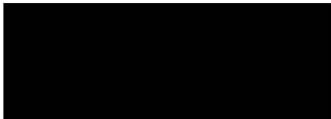
The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. On August 25, 2004, the director denied the petition.

On appeal, counsel provides copies of previously submitted documentation and copies of the petitioner's 1998 through 2000 and 2003 Forms 1120. The petitioner's 1998 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$11,400 and net current assets of -\$93,819. The petitioner's 1999 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$16,309 and net current assets of -\$75,651. The petitioner's 2000 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$15,827 and net current assets of -\$94,065. The petitioner's 2003 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$25,614 and net current assets of -\$18,310. Counsel did not submit a brief or draw any conclusions with regard to the evidence provided. The petitioner's CPA states:

Depreciation of building and furniture and fixtures is a non-cash expense and therefore should be added back to the net income from operations[.]

* * *

Employment of beneficiary would not cause material additional deduction from cash flow nor cause material additional expense as sub-contract expense for laundry and



housekeeping will be eliminated. Please note that 1999 and 2001 were the years that reflected lower amounts than \$30,091, however, the expense for the last three years has been increasing.

* * *

Land and Building are the major assets of the corporation as this houses the residents. It is protected by insurance, and value appreciates periodically.

Merely using the building and land as asset[s], these could absorb all the liabilities of the corporation.

* * *

The corporation never incurred losses since inception, even with the inclusion of a non-cash item, depreciation.

The major liability of the corporation is mortgage payable which is secured by the building owned by the corporation which houses the residents. As a [result], there is [sic] no rental expenses, and instead, funds are used to pay the mortgage.

The corporation was advanced some monies by sole owners/stockholders [redacted] and [redacted] [redacted] for down payment of the property. It was \$165,052 in 1996, down to \$137,956 in 1997, down to \$100,956 in 1998, down to \$87,753 in 1999, down to \$81,526 in 2000, down to \$73,200 in 2001, down to \$51,416 in 2002, and to \$27,488 in 2003. Since the officers are also the stockholders, [repayment] of the loan could be postponed if other financial needs arise. As proof of the liquidity of the corporation it was able to meet its other liabilities as well as the repayment of the advances of the officers.

Another liability item in the balance sheet is prepaid rent and security deposit by residents. . . . These are refunded to a resident when he leave[s] the facility. As per experience, however, this is immediately replaced by a payment of a new replacement-resident. This is not therefore considered a material liability. The facility has always been operating on a 100% capacity.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 1997 through 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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 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.¹ 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 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 out of those net current assets. The petitioner's net current assets during 1997 through 2003 were -\$99,951, -\$93,819, -\$75,651, -\$94,065, -\$83,564, -\$52,264, and -\$18,310, respectively. The petitioner could not have paid the proffered wage in 1997 through 2003 from its net current assets.

On appeal, the CPA contends that depreciation is a non-cash expense and should be added back to the net income from operations. However, the CPA's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

¹ 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.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost 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 the CPA asserts that they should not be charged against income according to their depreciation schedule, she does not offer any alternative allocation of those costs.

The CPA contends that by using the building and land as assets, the liabilities of the corporation could be absorbed. While this statement may be true, buildings and land are regarded as long-term assets, and 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. In addition, any mortgage payments due on the property would be considered a short-term liability, payable in less than one year, and would decrease the petitioner's net current assets. See explanation of net current assets above.

The CPA asserts that since the officers are also the stockholders, repayment of a loan could be postponed if other financial needs arise. 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). 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."

The CPA argues that prepaid rent and security deposits by residents are not material liabilities, since they are refunded to a resident when he/she leaves the facility. However, the CPA does not explain how this accounting anomaly would appreciably affect the monies that would be available to pay the beneficiary the proffered wage, since, as she notes, they were already accounted for as a current liability in our analysis above. See line 18, part of net current liabilities on Schedule L of the tax return. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The CPA also claims, "employment of the beneficiary would not cause material additional deduction from cash flow nor cause material additional expense as sub-contract expense for laundry and housekeeping will be eliminated." However, Form ETA 750, under Part 13, Describe Fully the Job to be Performed (*Duties*), does not specifically require the beneficiary to perform the laundry duties. Instead, Part 13, states [the beneficiary] will sort, count, fold, mark, or carry linens and will collect soiled linens for laundering, and receive and store linen supplies in linen closet. Therefore, the sub-contract expense for laundry cannot be utilized to determine the petitioner's ability to pay the proffered wage. Instead, only the sub-contract expense for housekeeping may be considered when determining the petitioner's ability to pay the proffered wage from the priority date of November 7, 1997 and continuing to the present.

In 1997, the sub-contract expense for housekeeping was \$9,100. When adding that expense to the net income of \$9,394, the result is \$18,494, or \$11,597.36 less than the proffered wage of \$30,091.36. The petitioner could not have paid the proffered wage from the combination of its net income and sub-contract expense for housekeeping in 1997.

In 1998, the sub-contract expense for housekeeping was \$24,000. When adding that expense to the net income of \$11,400, the result is \$35,400, or \$5,308.64 more than the proffered wage of \$30,091.36. The petitioner could have paid the proffered wage from the combination of its net income and sub-contract expense for housekeeping in 1998.

In 1999, the sub-contract expense for housekeeping was \$24,500. When adding that expense to the net income of \$16,309, the result is \$40,809, or \$10,717.64 more than the proffered wage of \$30,091.36. The petitioner could have paid the proffered wage from the combination of its net income and sub-contract expense for housekeeping in 1999.

In 2000, the sub-contract expense for housekeeping was \$24,000. When adding that expense to the net income of \$15,827, the result is \$39,827, or \$9,735.64 more than the proffered wage of \$30,091.36. The petitioner could have paid the proffered wage from the combination of its net income and sub-contract expense for housekeeping in 2000.

In 2001, the sub-contract expense for housekeeping was \$16,600. When adding that expense to the net income of \$9,071, the result is \$25,671, or \$4,420.36 less than the proffered wage of \$30,091.36. The petitioner could not have paid the proffered wage from the combination of its net income and sub-contract expense for housekeeping in 2001.

In 2002, the sub-contract expense for housekeeping was \$19,409. When adding that expense to the net income of \$23,231, the result is \$42,640, or \$12,548.64 more than the proffered wage of \$30,091.36. The petitioner could have paid the proffered wage from the combination of its net income and sub-contract expense for housekeeping in 2002.

In 2003, the sub-contract expense for housekeeping was \$20,156. When adding that expense to the net income of \$25,614, the result is \$45,770, or \$15,678.64 more than the proffered wage of \$30,091.36. The petitioner could have paid the proffered wage from the combination of its net income and sub-contract expense for housekeeping in 2003.

In summary, the petitioner has established its ability to pay the proffered wage of \$30,091.36 in 1998, 1999, 2000, 2002, and 2003, but not in 1997 and 2001.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner has provided tax returns for seven years, 1997 through 2003, which shows that the petitioner has not incurred any losses in those years. However, the petitioner has not shown that in the two years it was unable to pay the proffered wage, 1997 and 2001, there were unusual circumstances that existed in this case to parallel those in *Sonogawa*, nor has it been established that 1997 and 2001 were uncharacteristically unprofitable years for the petitioner. There is also no evidence of the petitioner's reputation throughout the industry.

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 not met that burden.

ORDER: The appeal is dismissed.