

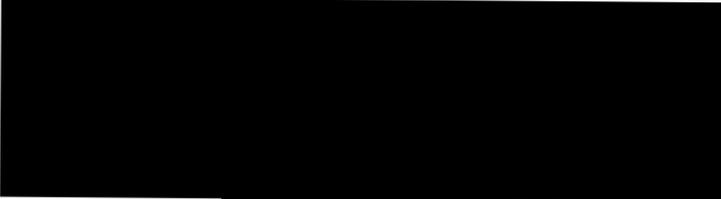
identifying data elements to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE:



Office: VERMONT SERVICE CENTER

Date: MAR 27 2008

EAC 04 152 50811

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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, or that the beneficiary had the requisite work experience, beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, counsel submits:

- A brief;
- Counsel's G-28;
- A copy of the petitioner's certificate of incorporation;
- Resubmitted copies of the petitioner's Form 1120 for 2001–2003;
- A copy of the W-2 Wage and Tax Statements for 2001 and 2002 for workers other than the beneficiary;
- A copy of the petitioner's October 17, 2002 "Financial Formula" business plan; and,
- A spreadsheet of the petitioner's quarterly taxable wage for the fourth quarter of 2003; and,
- An October 18, 2004 letter, not on letterhead, of a Brooklyn, NY company confirming the beneficiary's two-year work experience from July 1998 through July 2000.

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 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 2, 2001. The proffered wage as stated on the Form ETA 750 is \$13.17 per hour (\$27,393.60 per year). The Form ETA 750 states that the position requires two years experience.

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 May 1995, to have a gross annual income of \$296,085, and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal years lasts from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on February 10, 2001, the beneficiary claimed to have worked for the petitioner since August 2000.

With the petition, the petitioner submitted the following documents:

- An original certified ETA 750;
- A copy of a¹ Form 1099-MISC for the year 2003² listing \$26,000 in wages paid to an individual; and,
- Copies of the petitioner's Form 1120 for 2001–2003.

The director denied the petition on September 21, 2004, finding that the evidence submitted with the petition did not establish that the petitioner had the continuing ability to pay the proffered wage, or that the beneficiary had the requisite job experience, beginning on the priority date.

On appeal, counsel asserts that the evidence on appeal establishes that proffered position is not a new one but a replacement of an existing position held by the owner, employing the beneficiary half-time in 2000, 2001 and 2002, and full time starting in 2003. Further, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (R.C. 1967), in asserting that, in addition to the petitioner's federal tax returns, the petitioner has followed a "financial formula" for growth so that the petitioner's sole shareholder could switch from baker to become the petitioner's full-time administrator.

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 appears to have established that it employed and paid the beneficiary \$26,000 in 2003.³ Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through 2003. Instead, the petitioner paid partial wages in the amounts of \$26,000 in 2003, which is \$1,393.60 less than the proffered wage. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary in 2003 and the proffered wage.

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*

¹ The wage recipient listed on the form is [REDACTED] of [REDACTED] Rutherford, NJ 07070. The beneficiary is listed on the petition as [REDACTED]. However, On the ETA 750, the beneficiary is listed as [REDACTED].

Counsel does not explain why he did not submit the beneficiary's Form 1099s for the years 2000–2002.

³ In any future proceeding the petitioner should explain the discrepancies in the record of the beneficiary's names and addresses.

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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$27,393.60 per year from the priority date through 2002, and the \$1,393.60 difference between the wages actually paid to the beneficiary in 2003.

In 2003, the Form 1120 stated net income⁴ of \$8,039.

In 2002, the Form 1120 stated net income of \$4,666.

In 2001, the Form 1120 stated net income of \$7,113.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the proffered wage, even though for the year 2003, the petitioner established it had sufficient net income to pay the difference between the wage paid in that year and the 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. 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 during 2001 were -\$23,577, and during 2002, were -\$22,727.60.

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 is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that the petitioner's "financial formula" business plan shows the beneficiary was hired half-time in 2000 to replace the owner, going full-time in 2003, thereby establishing the petitioner's ability to pay the proffered wage.

The record does not, however, provide evidence that the petitioner has replaced or will replace the petitioner's owner with the beneficiary as a baker. The record of proceedings does not contain the beneficiary's Form 1099-MISC for any of the years 2000–2002, and does not include documents showing the replacement occurred as of the April 2, 2001 priority date. Further, counsel's assertion that the petitioner planned to only hire the beneficiary half time and not full-time until 2003, demonstrates, that the petitioner may not have been offering a full-time position as of the priority date, as set forth on the ETA 750. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part, "The petitioner must demonstrate this ability at the time the priority date is established."

Counsel claims that the owner's "salary decreased substantially to allow for the implementation of a master baker taking over his old position in the company," referring to W-2s to other employees. However, the record of proceedings shows the president's compensation rising from \$13,000 in 2000, to \$14,000 in 2001, to \$15,440 in 2002, before dropping to \$6,000 in 2003. The petitioner claims that during this entire period the owner gradually let the beneficiary perform the same job described on the labor certification. The petitioner claims that the compensation paid to the owner will now be available for payment to the alien as a full-time employee. The petitioner's assertion is not persuasive. The petitioner has not documented the petitioner's owner's position or duties or when the petitioner terminated those duties being replaced by the proffered position. Further, the size of reduction of the owner's wages is not sufficient to demonstrate the availability of \$27,393.60 in wages available on the priority date to pay the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As to counsel's citation of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), the case 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that was an uncharacteristically unprofitable year for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation

of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Counsel's assertions on appeal cannot be concluded to 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.

On appeal, counsel submits a letter purporting to be that of the beneficiary's former employer, confirming the beneficiary's job experience. The regulation at 8 C.F.R. § 204.5(g), in pertinent part, states:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The letter, which describes the beneficiary's previous job as a full-time baker, does not appear on letterhead, lacks a detailed description of the job duties or of the training he received. In any future proceedings, the petitioner should rectify these lapses in any letters of experience.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage, or that the beneficiary had the requisite job experience, 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 not met that burden.

ORDER: The appeal is dismissed.