

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE:

EAC 04 118 51791

Office: VERMONT SERVICE CENTER

Date:

MAR 30 2006

IN RE:

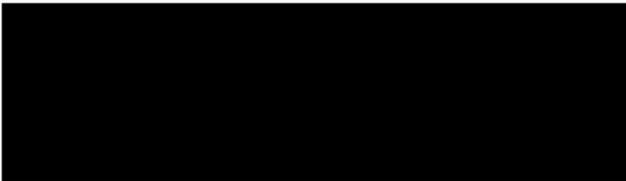
Petitioner:

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a garment importer. It seeks to employ the beneficiary permanently in the United States as a fashion designer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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 and 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 granting 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, the day the Form ETA 750 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 Form ETA 750 was accepted for processing on October 26, 2001. The proffered wage as stated on the Form ETA 750 is \$64,821.84 per year.

On the petition, the petitioner stated that it was established during 1987 and that it employs five workers. The petition states that the petitioner's gross annual income is \$1,112,939 and that its net annual income is \$526. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since April 1, 1998. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Emerson, New Jersey.

In support of the petition, counsel submitted (1) copies of the petitioner's owner's 2001 and 2002 Form 1120, U.S. Corporation Income Tax Returns, (2) a letter, dated September 30, 1996, from a charitable organization in Fiji, (3) photocopies of portions of the December 1997 issue of Fiji Islands Business magazine, and (4) a photocopy of a pamphlet about the petitioner.

The petitioner's tax returns show that it is a corporation, that it incorporated on December 23, 1996, and that it reports taxes pursuant to the calendar year and cash basis accounting.

The petitioner's 2001 corporate tax return shows that the petitioner declared a loss of \$1,365 as its taxable income before net operating loss deductions and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002 tax return shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$526 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The September 30, 1996 letter states that the petitioner won awards in 1995 and 1996 in a fashion design contest held by, Project 91, the charitable organization that provided the letter.

The photocopied portions of the magazine show that the beneficiary was featured on the cover of that issue of the magazine, which also included an article about him and his fashion designs. The article indicates that the beneficiary won two fashion design awards at the Fijian Red Cross premier fashion awards in 1997.

The acting 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 and, on September 13, 2004, denied the petition.

On appeal, counsel submits (1) a copy of the petitioner's 2003 Form 1120, U.S. Corporation Income Tax Return, (2) copies of Form W-2 Wage and Tax Statements for the years 1998 through 2003, (3) a letter, dated October 5, 2004 from the petitioner's president, and (5) a brief.

The petitioner's 2003 return shows that during that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$4,724. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The W-2 forms submitted show that the petitioner paid the beneficiary \$10,320, \$33,540, \$33,540, \$30,960, \$30,960, and \$33,540 during 1998, 1999, 2000, 2001, 2002, and 2003, respectively. The priority date of the instant visa petition, however, is October 26, 2001. Evidence pertinent to prior years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and will not be further addressed.

The petitioner's president's letter states that the petitioner's business suffered after the attacks of September 11, 2001 both because of its dependence on companies previously housed at the World Trade Center and because its offices were located in the Empire State Building which, after September 11, 2001, was considered a target, which had a dampening effect on the petitioner's business. The petitioner's president cites the petitioner's 2003 tax return as evidence that its business is now strong.

The petitioner's president asserts that Fiji Islands Business magazine is one of the most important magazines in Fiji, but provides no evidence in support of that assertion.

In the appeal brief counsel asserts that “the petitioner suffered a temporary fall-out of business and profitability during the years 2001-02 as a direct and indirect result of the World Trade Center disaster,” and that “The most recent tax return reflects a profitable operation, after deduction for depreciation, officers [sic] salaries and other business expenses.” Counsel also cites the petitioner’s total assets and its retained earnings as indices of its ability to pay the proffered wage. Counsel further notes that the petitioner has paid the beneficiary regularly.

Finally, counsel asserts “The beneficiary is a noted Fashion Designer from Fiji, who has been featured on the cover of major business publications in Fiji.

Counsel’s implication that the petitioner’s depreciation deduction should somehow be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost or other basis 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 counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.¹ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.²

Counsel similarly implies that the petitioner’s Form 1120 Line 12, Compensation of Officers need not have been paid to its officers, but could have been retained by the petitioner to pay the proffered wage, and is therefore an index of the petitioner’s ability to pay the proffered wage.³ Counsel provides no evidence,

¹ Counsel does not urge, for instance, that the petitioner’s purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner’s ability to pay additional wages.

² The petitioner’s depreciation deduction was \$3,601 during 2001, \$1,362 during 2002, and \$784 during 2003. Even if those amounts were treated as funds available to the petitioner with which to pay additional wages, they would be insufficient to show that the petitioner was able to pay the proffered wage in this case and to render the instant petition approvable.

³ The petitioner paid no officer compensation during 2001 and 2002, and paid only \$2,000 officer compensation in

however, to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

Counsel cites the petitioner's retained earnings as an indication of additional funds available to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income is therefore duplicative, at least in part.

Further, even if considered separately from net income, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer pay to its employees in cash while continuing in business. They are not, therefore, an index of a company's ability to pay additional wages.

In asserting that the beneficiary has won awards for his fashion designs and that the petitioner's business suffered after the incidents of September 11, 2001 counsel appears to be asserting that the petition in the instant case should be approved pursuant to the holding in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. 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. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, 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 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 couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage.

Here, however, the record contains no evidence that the petitioner has ever posted a large profit. The 2003 tax return, relied upon by counsel as an index of the petitioner's improved profits, is insufficient to show the petitioner's ability to pay the proffered wage during that year, as will be further explained below. Although

2003. Even if that amount were included in the calculations pertinent to the petitioner's ability to pay extra wages is would be insufficient to render the instant petition approvable.

counsel has cited the incidents of September 11, 2001 to explain its poor performance during 2001 and 2002, it has not demonstrated that those were unusually unprofitable years for the petitioner.

Although the petitioner's president asserts that Fiji Island Business is one of the top publications in Fiji he provides no evidence in support of that assertion. Absent evidence of the stature of that magazine, this office cannot equate being featured in Fiji Island Business with being featured in Time and Look magazines. Further, that the beneficiary won awards in design contests held by various local charities does not demonstrate that his international reputation should be equated with that of the beneficiary in *Sonegawa*.

Finally, the petitioner has employed the beneficiary since April of 1998. If the petitioner had not yet employed the beneficiary it might have been able to demonstrate, rather than allege, that hiring the beneficiary would result in improved profitability. How the petitioner's profitability could be expected to rise from merely continuing to employ the beneficiary, as the petitioner has since 1998, is unclear. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed the beneficiary during 2001, 2002, and 2003 and paid him \$30,960, \$30,960, and \$33,540 during those years, respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, the petitioner's year-end cash and those assets expected to be consumed

or converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$64,821.84 per year. The priority date is October 26, 2001

Having demonstrated that it paid the beneficiary \$30,960 during 2001 the petitioner is obliged to demonstrate the ability to pay the \$33,861.84 balance of the proffered wage. During that year the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to the petitioner during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

Having demonstrated that it paid the beneficiary \$30,960 during 2002 the petitioner is obliged to demonstrate the ability to pay the \$33,861.84 balance of the proffered wage. During that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$526. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

Having demonstrated that it paid the beneficiary \$33,540 during 2003 the petitioner is obliged to demonstrate the ability to pay the \$31,281.84 balance of the proffered wage. During that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$4,724. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.