



U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC-04-020-52296

Office: VERMONT SERVICE CENTER

Date: **MAY 02 2006**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as an Other Worker 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
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 restaurant. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied 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 and 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 not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is April 30, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$13.67 per hour, which amounts to \$28,433.60 annually. The ETA 750 was certified by the Department of Labor on May 14, 2003.

The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

The I-140 petition was submitted on October 24, 2003. On the petition, the petitioner claimed to have been established in June 1999 and to currently have three employees. The items on the petition for gross annual income and for net annual income were left blank. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B,

¹ The ETA 750 cover sheet issued by the Department of Labor states that the priority date is June 30, 2001. However, the first page of the Form ETA 750 contains the notation "4/30/01" in the block for the date the form was received within the employment system of the Department of Labor.

signed by the beneficiary on October 22, 2003, the beneficiary did not claim to have worked for the petitioner.

In a decision dated July 9, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

The petitioner submitted a motion to reopen with the director on August 10, 2004. With the motion, counsel submitted additional evidence.

In a decision dated September 29, 2004, the director granted the motion to reopen. The director then reviewed the additional evidence submitted with the motion and found that the evidence failed to establish the petitioner's ability to pay the proffered wage during the years at issue. The director accordingly reaffirmed her previous decision and denied the petition.

On appeal, counsel submits a brief and additional copies of evidence previously submitted for the record. Counsel states on appeal that depreciation deductions on its tax returns should be considered as additional financial resources of the petitioner. Counsel states that the petitioner's low net income in 2001 should not be regarded in a negative light because the petitioner is a young entity established in April 2001. Counsel also states that in 2001 the petitioner had total assets of \$36,589.00 and minimal liabilities.

Counsel also states that in 2001 the petitioner's business increased, and that the petitioner's financial situation establishes its ability to pay the proffered wage under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, 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 instant case, on the Form ETA 750B, signed by the beneficiary on October 22, 2003, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another 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 for a given year, 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001, 2002 and 2003. The record before the director closed on August 10, 2004 with the receipt by the director of the petitioner's motion to reopen. As of that date the petitioner's federal tax return for 2003 was the most recent return available.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

Similarly, some deductions appear only on the Schedule K. See Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>; Internal Revenue Service, Instructions for Form 1120S (2003), at 22, available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>.

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Line 23 of the Schedule K, for income.

In the instant petition, the petitioner's tax returns for 2001 and 2002 indicate no income from activities other than from a trade or business and no additional relevant deductions, but its tax return for 2003 indicates \$1.00 of interest income on the Schedule K and no additional relevant deductions. For purposes of consistency, net income for all three years will be considered to be the figure on line 23 of the Schedule K's, for income.

The petitioner's tax return for 2001 is marked as an initial return and it covers the period from April 1, 2001 through December 31, 2001. Since the petitioner was apparently not functioning for the first three months of that year, the analysis below will evaluate the proffered wage for a nine-month proportional amount for the year 2001.

The petitioner's tax returns state amounts for income on line 23, Schedule K as shown in the following table:

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$16,005.00	\$21,325.20*	-\$5,320.20
2002	\$24,055.00	\$28,433.60**	-\$4,378.60
2003	\$35,273.00	\$28,433.60**	\$6,839.40

* The full proffered wage for the nine-month period from April 1, 2001 through December 31, 2001, with no evidence of any wage payments made by the petitioner to the beneficiary.

** The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2002, but the information is sufficient for the year 2003.

Counsel states on appeal that depreciation deductions on its tax returns should be considered as additional financial resources of the petitioner. While it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.

For the foregoing reasons, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	\$0.00	\$607.00	\$21,325.20*
2002	\$607.00	\$17,888.00	\$28,433.60**
2003	\$17,888.00	\$7,273.00	\$28,433.60**

* The full proffered wage for the nine-month period from April 1, 2001 through December 31, 2001, with no evidence of any wage payments made by the petitioner to the beneficiary.

**The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. For 2003, however, the petitioner's net income is sufficient to establish the petitioner's ability to pay the proffered wage, as discussed above.

The record also contains a copy of a Form 1040 U.S. Individual Income Tax Return for 2001 of the individual who is shown on the Form 1120S tax returns to be the owner of 100% of the shares of the petitioner. The Form 1040 shows that during at least part of that year the owner's restaurant business under the petitioner's name was a sole proprietorship. The Form 1120S tax return of the petitioner for 2001 is marked as an initial return, and it states that the effective date of election as an S corporation was April 1, 2001. That date was before the priority date of April 30, 2001. Therefore during the entire period relevant to the instant petition, the petitioner apparently was an S corporation. The employer identification number of the corporation on the Form 1120S tax returns is a number ending in the three digits [REDACTED]. However, the IRS tax number stated on the I-140 petition is a number ending in the three digits [REDACTED] which is the employer identification number of the business as a sole proprietorship as shown on the Schedule C attached to the owner's Form 1040 U.S. Individual Income Tax Return for 2001.

At the time the I-140 petition was filed, on October 24, 2003, the petitioner purportedly had been operating as an S corporation for almost two and one-half years. Therefore the sole proprietorship business with the employer identification number ending in [REDACTED] presumably was no longer functioning.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the inconsistency between the IRS tax number on the Forms 1120S, ending in [REDACTED] and the employer identification number ending in [REDACTED] which is stated on the I-140 petition.

Counsel also asserts that the evidence establishes the petitioner's ability to pay the proffered wage under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). However, counsel's reliance on *Matter of Sonogawa* is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within 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 \$100,000.00. 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 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.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. Although on the I-140 petition the petitioner states that it was established in June of 1999, the corporation which is the petitioner apparently was formed in early 2001, since on the Form 1120S tax returns the date of election as an S corporation is stated to be April 1, 2001. Therefore the corporation had been functioning only for a short time before the Form ETA 750 was filed on April 30, 2001.

The record contains no other evidence relevant to the petitioner's financial situation. The evidence therefore fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her September 29, 2004 decision on the petitioner's motion to reopen, the director correctly stated the petitioner's net income in 2001, 2002 and 2003, and correctly calculated the petitioner's year-end net current assets for each of those years. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.