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**U.S. Citizenship
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FILE: EAC 03 252 52967 Office: VERMONT SERVICE CENTER

Date: MAY 03 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, 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 on appeal. The appeal will be dismissed.

The petitioner is a Turkish restaurant and provider of Turkish entertainment. It seeks to employ the beneficiary permanently in the United States as a Turkish music singer and instrument player. 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.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$34.26 per hour (\$62,353.20 per year)¹. The Form ETA 750 states that the position requires 8 years experience.

On appeal, counsel submits a legal brief and additional evidence.

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

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on June 9, 2004 pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested the petitioner's U.S. federal tax returns for 2002 and 2003 as well as the beneficiary's W-2 Wage and Tax Statements for 2001, 2002 and 2003.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted an explanatory letter and copies of the following documents: the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for years 2001, 2003 and, a partial copy of the 2002 return.

In the explanatory letter dated September 3, 2004, counsel contends that for each of the above years for which tax returns were submitted, the "aggregate" of the total sums comprising ordinary income, cash on hand, inventories, other current assets (advanced taxes paid), building and "other depreciable assets, and depreciation" all evidence the ability to pay the proffered wage. Additionally, counsel contends compensation to corporate officers, its years that the petitioner has been in business since 1998, and gross sales, all evidence the ability to pay the proffered wage. Further, counsel contends that the petitioner should be required to pay \$41,968.50 out of the proffered wage of \$62,353.20 per year for tax year 2001.

The director denied the petition on October 5, 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 reiterates his assertions in the explanatory letter dated September 3, 2004 mentioned above.

Counsel has submitted the following documents to accompany the appeal statement: the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for years 2000, 2001, and 2003.

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. No evidence was submitted to show that the petitioner employed the beneficiary.

¹ Based upon a 35-hour week.

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 returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$62,353.20 per year from the priority date of April 30, 2001:

- In 2000, the Form 1120S stated a taxable income loss² of <\$17,482.00>.³
- In 2001, the Form 1120S stated a taxable income loss of <\$19,346.00>.
- In 2002, the Form 1120S, Schedule K-1 stated a taxable income loss of <\$20,209.00>.
- In 2003, the Form 1120S stated taxable income of \$70,261.00.

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 2002 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.⁴ 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 1120S 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 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns⁵ indicates the following:

² IRS Form 1120S, Line 21. The taxable year stated on the 2000 return is December 1, 2000 through November 30, 2001. This period encompasses the priority date of April 30, 2001.

³ 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.

⁴ 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.

⁵ There was no Schedule L submitted for tax year 2002.

- In 2000, petitioner's Form 1120S return stated current assets of \$33,360.00 and \$5,616.00 in current liabilities. Therefore, the petitioner had \$27,744.00 in net current assets. Since the proffered wage is \$62,353.20 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120S return stated current assets of \$26,336.00 and \$6,002.00 in current liabilities. Therefore, the petitioner had \$20,334.00 in net current assets. Since the proffered wage is \$62,353.20 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120S return stated current assets of \$17,134.00 and \$6,054.00 in current liabilities. Therefore, the petitioner had \$11,080.00 in net current assets. Since the proffered wage is \$62,353.20 per year, this sum is less than the proffered wage.

Therefore, for the period 2000, 2001, and 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.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁶ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel contends that the "aggregate" of the total sums comprising ordinary income, cash on hand, inventories, other current assets including advanced taxes paid, building and "other depreciable assets, and depreciation" evidence the ability to pay the proffered wage. Correlating the amounts stated in counsel's contention with the petitioner's tax return for each year, it is clear that counsel is combining petitioner's

⁶ 8 C.F.R. § 204.5(g)(2).

taxable income each year with the cash also received by the business for that year as stated on Schedule "L" as current assets. CIS will consider separately the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. The AAO rejects counsel's argument that the petitioner's net current assets can be added to its net income in 2000 or any other year in order to have sufficient funds to pay the proffered wage. That method double-counts the petitioner's income contrary to the utilization of either the cash-or accrual basis of accounting. The first page of a federal tax return is akin to an income statement that includes the petitioner's net income. The net income is an amount summarizing the petitioner's revenues, costs and expenses over time. The tax statement "Schedule L" reflects assets and liabilities on dates certain during the fiscal year. It is used to compose the final summary presented on the income statements as the net income amount. Therefore, to add these two final dollar amounts together from the two pages of the federal tax return essentially double counts the dollar amounts to distort the true representation of the petitioner's finances.

We reject the petitioner's assertion that the petitioner's total assets (inventories, other current assets (advanced taxes paid), building and other depreciable 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.

Also, counsel suggests that the amount of the gross earnings of the petitioner lends credence to the petitioner's ability to pay the proffered wage. As already stated above, in *K.C.P. Food Co., Inc. v. Sava, Supra* at 1084 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. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive.

Counsel contends that the officer's compensation is available to pay the proffered wage. Since it has been paid, the officer's compensation is an expense. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. In this case, the record contains no documentation or other competent evidence that demonstrates the three shareholder's willingness to reduce his or her own salaries. Further, since the officers have made no commitment or offer to reduce their compensation by anything in evidence, counsel is merely speculating upon what could have happened in the past (but did not) and what may or may not happen in the future. Based upon what is known, the petitioner has employed the beneficiary, and, it has not chosen to pay the proffered wage.

The value of inventories owned by the petitioner and their ability available to produce future income cannot be evidence of the ability to pay. Counsel maintains that the inventories' 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. Insofar as the revenue generated is expressed ultimately on the tax returns as taxable income, counsel is attempting to duplicate the petitioner's income producing potential without considering the offsetting cost of operations. 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.

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in an unprofitable period in 2000, 2001 and 2002. For the years 2001 through 2002, the taxable income losses were <\$17,482.00>, <\$19,346.00>, and in 2002, the Form 1120S, Schedule K-1⁷ stated a taxable income loss of <\$20,209.00>. The net current asset value for those years is positive, but less than the proffered wage of \$62,353.20 per year. Although the Director had requested the 2002 tax return, the petitioner introduced only a part of the return. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonogawa*, to establish that the periods examined were an uncharacteristically unprofitable period for the petitioner. By the evidence presented, the petitioner has not demonstrated its ability to pay the proffered wage.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that by any test, except for tax year 2003, demonstrates that 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.

⁷ There are Schedule K forms submitted with petitioner's returns for the shareholder owner. If an S corporation has income from multiple sources other than trade or business, that income is stated on Schedule K. Similarly, additional deductions and income may be included on Schedule K. Schedule "K statements as submitted with the tax returns apportion taxable income of the petitioner as reported on Line 21 as further reduced by deductions taken on the shareholder's Schedule K.

