

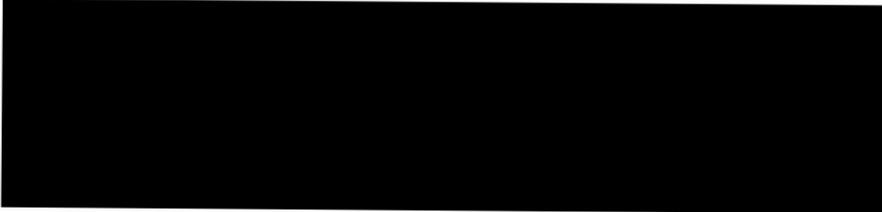
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FILE: EAC 04 144 51222 Office: VERMONT SERVICE CENTER Date: MAY 09 2006

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 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 construction and renovation company. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 September 11, 2001. The proffered wage as stated on the Form ETA 750 is \$23 per hour, which equals \$47,840 per year.

On the petition, the petitioner stated that it was established during 1999. In the space reserved for the number of workers it employs the petitioner entered, “(owner operated).” The petition states that the petitioner’s gross annual income was \$166,297 during 2001 and that its net annual income was \$34,557 during that same year. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Baltimore, Maryland.

In support of the petition, counsel submitted a copy of the petitioner’s 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a corporation, that it incorporated on April 28, 1999, and that it reports taxes pursuant to the calendar year and accrual convention accounting. During 2001 the petitioner declared ordinary income of \$34,557. At the end of that year the petitioner had current assets of \$2,980 and current liabilities of \$1,980, which yields net current assets of \$1,000.

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 16, 2004, denied the petition.

On appeal, counsel submits (1) copies of its 2002 and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) copies of monthly statements pertinent to the petitioner's bank account, (3) a letter dated October 26, 2004 from its accountant, and (4) a brief.

The petitioner's 2002 tax return shows that it declared ordinary income of \$105,036 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$106,036 and no current liabilities, which yields net current assets of \$106,036.

The petitioner's 2003 tax return shows that it declared ordinary income of \$44,306 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of \$0.

The accountant's October 26, 2004 cites the amount of the petitioner's gross receipts and ordinary income during each of the salient years as indices of its continuing ability to pay the proffered wage beginning on the priority date.

In his brief counsel also cites the petitioner's gross receipts, the increase in its gross receipts, and its bank statements as evidence of its ability to pay the proffered wage. Counsel notes that ". . . nothing in the Act or federal regulations . . . requires the petitioner to demonstrate large net income." Later in the brief counsel states that 8 C.F.R. § 204.5(g)(2) does not prescribe a "set figure or dollar amount . . . **to establish the ability to pay the proffered wage.**"<sup>1</sup> [Emphasis in the original.]

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the instant petition should be approved notwithstanding that the proffered wage exceeded the petitioner's ordinary income during some years if the petitioner has a reasonable expectation of increasing business and profits. Counsel cites *Oriental Pearl Restaurant*, 12 Immig. Rptr. B-3-43 (1993), a Department of Labor (DOL) Bureau of Alien Labor Certification Appeals (BALCA) case, for essentially the same proposition as that for which he cited *Sonogawa*, *supra*. Counsel also cites two non-precedent cases of this office; the facts of which counsel implies are analogous to those of the instant case, also for the proposition that the petition should be approved.

While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, non-precedent decisions and BALCA decisions are not similarly binding. Counsel's citation of non-precedent decisions and a BALCA decision is of no effect.

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<sup>1</sup> In making that argument counsel refers to the petitioner as the Philippine Grill and states that it suffered a minimal loss during 1996 and has always met its payroll expenses. This office notes that the petitioner in this matter is M.O. Construction Enterprises, Incorporated, and that it did not exist during 1996, and that the evidence in this case does not establish that it has ever had any employees.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.<sup>2</sup> Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel's reliance on the petitioner's gross receipts is similarly misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>3</sup> or otherwise increased its net income,<sup>4</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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.

Counsel's reliance on an asserted increase in the petitioner's gross receipts is not persuasive. During 2001 the petitioner's gross receipts were \$166,297. They were \$244,691 during 2002 and \$148,524 during 2003. Those statistics show that the petitioner's gross receipts fluctuate but not that they are climbing.

Counsel's citation of *Matter of Sonogawa, supra*, is unconvincing. *Sonogawa* 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 *Sonogawa*, 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

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<sup>2</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

<sup>3</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>4</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then the petitioner has a reasonable expectation of increased profits, and its losses or low profits during a few years may be discounted in determining the ability to pay the proffered wage. Here, the record contains no evidence that the petitioner has consistently posted a large profit. The petitioner's ordinary income was sufficient to pay the proffered wage during only one of the three salient years. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2003 were uncharacteristically unprofitable years for the petitioner. 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 did not establish that it employed and paid the beneficiary.<sup>5</sup>

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<sup>6</sup> 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).

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

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<sup>5</sup> The petitioner's tax returns show no expenditure for salaries, wages, or cost of labor. The 2002 and 2003 returns show "other deductions" including payments to subcontractors, but contain no indication that the beneficiary was compensated as a subcontractor. The 2001 return shows a small expenditure for casual labor but, again, no indication that any portion of that expenditure was paid to the beneficiary.

<sup>6</sup> No precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054

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.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>7</sup> shown on lines 16(d) through 18(d). 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.

The proffered wage is \$47,840 per year. The priority date is September 11, 2001.

During 2001 the petitioner declared ordinary income of \$34,557. That amount is insufficient to pay the proffered wage. The petitioner had year-end net current assets of \$1,000. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$105,036. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$44,306. That amount is insufficient to pay the proffered wage. The petitioner had year-end net current assets of \$0. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2003 to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001 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.

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<sup>7</sup> The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.