

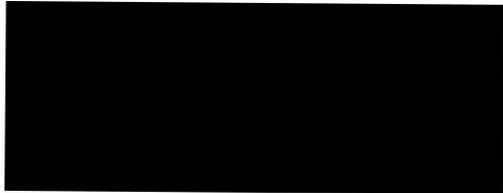
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U.S. Citizenship
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Services

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FILE: WAC 04 019 53273 Office: CALIFORNIA SERVICE CENTER Date: **MAY 16 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a cash wash services corporation. It seeks to employ the beneficiary permanently in the United States as a cash wash supervisor. 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.¹

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 unavailable.

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.

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

¹ The petitioner was originally submitted for a skilled worker or professional classification, but since the labor certification stated that the job required only one year of experience, and two years are required for the skilled worker classification, the director pointed out the inconsistency. The petitioner requested that the petition classification be amended to “other workers.”

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 November 3, 1997. The proffered wage as stated on the Form ETA 750 is \$30.35 per hour (\$63,128.00 per year). The Form ETA 750 states that the position requires one-year experience.

On appeal, the petitioner submits a legal brief and additional evidence.

With the petition, the petitioner submitted copies of the following documents: a copy of the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 1998, 1999, 2000, and 2001; Forms 941 and DE-6; a W-2 Wage and Tax Statement for 1995 from a prior employer; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director requested on June 4, 2004, that the petitioner reconsider the employment classification and a duplicate of the certified Alien Employment Application.

On June 23, 2004, the petitioner responded to the request for evidence by requesting that CIS request from the U.S. Department of Labor a duplicate of the certified Alien Employment Application, and, the petitioner reconsidered the employment classification, from skilled/worker to other workers.

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 August 9, 2004 pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested copies of California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees, and U.S. federal tax returns.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns and DE-6 Form statements.

The director denied the petition on December 8, 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, the petitioner asserts that the director is "mechanically" comparing the net income of the petitioner to the proffered wage, and, that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) requires that CIS examine the totality of the petitioner's financial circumstances. Further, the petitioner contends that because the petitioner utilizes the accrual accounting method and not the cash basis. Therefore, the petitioner asserts that the accounts receivable are not "accurately" stated. The petitioner provides a business appraisal that reflects a valuation of these total assets that evidences the ability to pay the proffered wage. The petitioner asserts that since the beneficiary has been employed since "year 2004" that this evidences the ability to pay the proffered wage, and that the denial of the petition will result in a hardship to the petitioner.

Also, the petitioner states that the U.S. Department of Labor has determined that there are no U.S. workers to "fill the proffered position." In determining the respective jurisdictions of the Department of Labor and the

CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. See *Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 214(a)(14) of the Act, 8 U.S.C. 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. The CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true.

Although the advisory opinions of other Government agencies are given considerable weight, the Service has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

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. The petitioner asserts that since the beneficiary has been employed since "year 2004" that this evidences the ability to pay the proffered wage. Evidence was submitted to show that the petitioner employed the beneficiary in 2004. The petitioner paid the beneficiary an hourly wage of \$30.35 per hour from October 4, 2004 to December 31, 2005. Total wages for that period was \$15,782.00. There is no evidence submitted that the petitioner paid the proffered wage of \$63,128.00 per year.

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 \$63,128.00 per year from the priority date of November 3, 1997:

- In 1998, the Form 1120 stated taxable income² of \$46,887.00.
- In 1999, the Form 1120 stated taxable income of \$23,949.00.
- In 2000, the Form 1120 stated taxable income of \$30,046.00.
- In 2001, the Form 1120 stated taxable income of \$16,071.00.
- In 2002, the Form 1120 stated taxable income of \$15,825.00.

From 1998 to 2002, the petitioner had insufficient taxable income to pay the proffered wage of \$63,128.00 per year.

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. No 2004 U.S. federal tax return was submitted, therefore this calculation cannot be made.

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 1998 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.³ 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 1120 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 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 1998, petitioner's Form 1120 return stated current assets of \$9,000.00 and \$322,245.00 in current liabilities. Therefore, the petitioner had <\$313,245.00>⁴ in net current assets. Since the proffered wage is \$63,128.00 per year, this sum is less than the proffered wage.
- In 1999, petitioner's Form 1120 return stated current assets of \$9,000.00 and \$252,821.00 in current liabilities. Therefore, the petitioner had <\$243,821.00> in net current assets. Since the proffered wage is \$63,128.00 per year, this sum is less than the proffered wage.

² The petitioner's tax year begins on November 1, 1998 and ends on October 31.

³ 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.

⁴ 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.

- In 2000, petitioner's Form 1120 return stated current assets of \$7,250.00 and \$253,630.00 in current liabilities. Therefore, the petitioner had <\$246,380.00> in net current assets. Since the proffered wage is \$63,128.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of \$7,250.00 and \$320,742.00 in current liabilities. Therefore, the petitioner had <\$313,492.00> in net current assets. Since the proffered wage is \$63,128.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of \$22,287.00 and \$72,603.00 in current liabilities. Therefore, the petitioner had <\$50,316.00> in net current assets. Since the proffered wage is \$63,128.00 per year, this sum is less than the proffered wage.

Therefore, for the period 1998 through 2002 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.

The petitioner 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,⁵ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

The petitioner contends that because the petitioner utilizes the accrual accounting method and not the cash basis. Therefore, the petitioner asserts that the accounts receivable are not "accurately" stated. The petitioner's tax returns were prepared pursuant to the accrual method, in which revenue is recognized when it is earned, and expenses are recognized when they are incurred. This office would, in the alternative, have accepted tax returns prepared pursuant to cash convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the accrual method then the petitioner, whose taxes are prepared pursuant to accrual, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not pursuant to the accountant's adjustments.

The petitioner provided a business appraisal that reflects a valuation of the total assets, realty, building and equipment that petitioner contends evidences the ability to pay the proffered wage. We reject the petitioner's assertion 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.

⁵ 8 C.F.R. § 204.5(g)(2).

The petitioner asserts that since the beneficiary has been employed since October 2004, and that the denial of the petition will result in a hardship to the petitioner. The assertions of the petitioner 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). No detail or documentation has been provided to explain how the beneficiary's employment as a car wash supervisor will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

In the totality of all the evidence submitted in this case, there is not evidence to demonstrate that the petitioner's business was in a profitable period in 1998, 1999, 2000, 2001 and 2002 that would enable the petitioner to pay the proffered wage of \$63,128.00 per year. For the years 1998, 1999, 2000, 2001 and 2002, the taxable income for the petitioner were \$46,887.00, \$23,949.00, \$30,046.00, \$16,071.00, and, \$15,825.00. For the years 1998, 1999, 2000, 2001 and 2002, the net current asset value for those years is negative in each year, <\$313,245.00> <\$243,821.00>, <\$246,380.00>, <\$313,492.00> and, <\$50,316.00>. Since the proffered wage is \$63,128.00 per year, neither taxable income nor net current assets are more than the proffered wage.

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 period examined was an uncharacteristically unprofitable period for the petitioner. By the evidence presented, the petitioner has not proven its ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's contentions cannot be concluded to outweigh the evidence presented in the five corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to 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 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.