

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

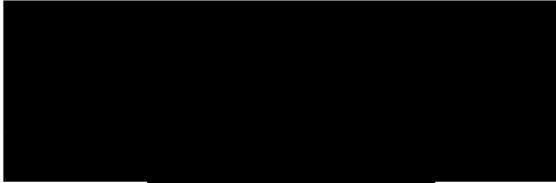
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



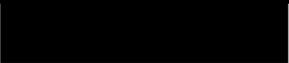
U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE:



Office: VERMONT SERVICE CENTER

Date:

NOV 01 2008

EAC 04 222 50089

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto and body repair business. It seeks to employ the beneficiary permanently in the United States as an automobile body repairer. 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 (DOL). 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. Therefore, the director denied the petition.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set out in the director's March 21, 2005 denial, the single issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 is accepted for processing by any office within the employment system of the DOL. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the Form ETA 750 for processing on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$23.39 per hour, or \$48,651.20 annually, based on a 40-hour work week. The Form ETA 750 states that the position requires three years of experience in the proffered position and the completion of eight years of grade school and four years of high school.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis.) The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.¹

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage: the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001, 2002 and 2003; the beneficiary's Form W-2, Wage and Tax Statement, for 2002 and 2003; the beneficiary's Form 1099-MISC, Miscellaneous Income, for 2001; and the beneficiary's Form 1040, U.S. Individual Income Tax Return, for 2001, 2002 and 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1985, to employ six workers and to have a gross annual income of \$300,000. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary claimed to have worked for the petitioner from 1997 until the date he signed the form.

On appeal, counsel asserts that the petitioner does have the ability to pay the proffered wage. He indicates that the director erred when he failed to include the petitioner's depreciation expense as funds available to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that Form 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 during a given period, 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. In this case, the record does not contain any evidence to establish that the petitioner employed and paid the beneficiary the full proffered wage from the priority date onwards. The beneficiary's 2001 Form 1099-MISC does reflect that the petitioner paid the beneficiary \$23,528 during 2001.² The beneficiary's Forms W-2 included in the record reflect that the petitioner paid the beneficiary \$16,600 during 2002 and \$33,600 during 2003. The petitioner is obligated to demonstrate that it can pay the difference between wages it actually paid to the beneficiary and the proffered wage in each year, which is \$25,123.20, \$32,051.20 and \$15,051.20 in 2001, 2002 and 2003, respectively.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² Counsel erred and indicated that the petitioner paid the beneficiary \$32,090 in 2001. The Form 1099-MISC indicates that it paid the beneficiary \$23,528.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, contrary to counsel's assertions. 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). Reliance on the petitioner's gross sales, profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, documenting that the wages which the petitioner paid overall were more than the proffered wage is not sufficient.

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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns in the record demonstrate the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered annual wage from the priority date:

- The Form 1120 for 2001 states a net income³ of \$6,202.
- The Form 1120 for 2002 states a net income (loss) of (\$1,052)⁴.
- The Form 1120 for 2003 states a net income of \$0.

A net income of \$6,202 when added to \$23,528, the amount that the petitioner paid the beneficiary in 2001, is \$29,730. This is \$18,921.20 less than the proffered wage. A net loss of \$1,052 when added to \$16,600, the amount that the petitioner paid the beneficiary in 2002, is \$15,548. This is \$33,103.20 less than the proffered wage. A net income of \$0 when added to \$33,600, the amount that the petitioner paid the beneficiary in 2003, is \$33,600. This is \$15,051.20 less than the proffered wage. Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the beneficiary the balance of the proffered wage.

³ Ordinary income (loss) from trade or business activities as reported on Line 28 of the Form 1120.

⁴ In his March 21, 2005 denial, the director erred and indicated that the petitioner's 2002 net income was \$0.

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. 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 may not, therefore, be viewed as funds available to pay the proffered wage, contrary to counsel's assertions. 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 contrary to counsel's assertions. As such, 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.⁵ A corporation's year-end current assets are shown on the Form 1120, Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18 of Schedule L. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary, if any, are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets (liabilities) during 2001 were (\$16,425).
- The petitioner's net current assets during 2002 were \$14,814.
- The petitioner's net current assets (liabilities) during 2003 were (\$12,787).

Net current liabilities of \$16,425 when added to \$23,528, the amount that the petitioner paid the beneficiary in 2001, is \$7,103. This is \$41,548.20 less than the proffered wage. Net current assets of \$14,814 when added to \$16,600, the amount that the petitioner paid the beneficiary in 2002, is \$31,414. This is \$17,237.20 less than the proffered wage. Net current liabilities of \$12,787 when added to \$33,600, the amount that the petitioner paid the beneficiary in 2003, is \$20,813. This is \$27,838.20 less than the proffered wage. Thus, for the years 2001 through 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

The petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date onwards through an examination of wages paid to the beneficiary, or an examination of its net income or net current assets in 2001, 2002 or 2003.

Finally, CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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.

⁵According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Accordingly, CIS may, in its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of its net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage. In this case, however, the only forms of evidence provided by the petitioner which are relevant to its ability to pay the beneficiary are its tax returns for 2001 through 2003 and the beneficiary's Form 1099-MISC for 2001 and the beneficiary's Form W-2 for 2002 and 2003. Such evidence is not sufficient to establish that the petitioner has met all of its obligations in the past or to establish its historical growth. In addition, such evidence is not sufficient to establish whether unusual circumstances exist in this case to parallel those in *Sonegawa*, nor to establish whether 2001 through 2003 were an uncharacteristically unprofitable year for the petitioner. Counsel's assertion that the record demonstrates that the petitioner's drop in gross receipts/income in 2002 was uncharacteristic of the petitioner's business, given its higher gross receipts in 2001 and 2003, and as such CIS should not view the 2002 receipts as indicative of "a long term lack of ability to pay" is misplaced. CIS shall not look to gross receipts when analyzing a petitioner's ability to pay the proffered wage. CIS shall rely on a petitioner's net income figures and not consider its income before expenses are paid when analyzing its ability to pay. *See K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084.

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

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.