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U.S. Citizenship
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FILE: [Redacted]
EAC 05 015 51845

Office: VERMONT SERVICE CENTER

Date: OCT 02 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 (director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal from the director's denial. The appeal will be dismissed.

The petitioner is a landscaping firm. It seeks to employ the beneficiary permanently in the United States as a landscaping supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

On appeal, counsel submits additional evidence and contends that the petitioner established its continuing financial ability to pay the proffered salary.

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) provides:

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. 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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$16.00 per hour, which amounts to \$33,280 per annum. On the Form ETA 750B, signed by the beneficiary on October 9, 2003, the beneficiary claims to have worked for the petitioner since October 1997.

On Part 5 of the visa petition, filed on October 14, 2004, the petitioner claims to have been established in April 1997, and to currently employ ten workers, to have a gross annual income of \$265,514, and a net annual income

of \$16,560. In support of its ability to pay the proffered wage of \$33,280, the petitioner initially provided two copies of its federal unemployment tax return (Form 940) for 2002 and 2003.

On November 23, 2004, the director issued a request for additional evidence in support of the petitioner's ability to pay the proffered wage of \$33,280. He advised the petitioner, pursuant to 8 C.F.R. § 204.5(g)(2) that such evidence must include either copies of annual reports, federal tax returns, or audited financial statements and establish the employer's continuing ability to pay the proffered wage as of the priority date of April 30, 2001. The director further requested copies of the beneficiary's Wage and Tax Statements (W-2s) for 2000, 2001, 2002, and 2003.

In response, the petitioner provided incomplete copies of its corporate federal income tax returns (Form 1120) consisting of only the first page and omitting Schedule L that would have revealed the petitioner's current assets and current liabilities.¹ The petitioner's taxable income before the net operation loss (NOL) is shown as follows:

	2001	2002	2003
Taxable Income before the NOL deduction	\$126	\$1,647	\$8,493

In addition, the petitioner supplied copies of the beneficiary's W-2s for 2001-2004. They show that the petitioner paid him wages in the following amounts:

2001	\$12,371.56
2002	\$12,880.32
2003	\$15,628.13
2004	\$20,872.00

The petitioner also provided copies of its Transmittal of its Wage and Tax Statements (W-3s) for 2002-2004, as well as a copy of its 2001 Form 940-EZ.

The director denied the petition on March 16, 2005. The director summarized the evidence that had been submitted and determined that none of the corresponding W-2s and net taxable income figures were sufficient to cover the proffered wage of \$33,280 in any of the relevant years. He concluded that the petitioner had not

¹Net current assets are the difference between a petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period. Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

established its continuing financial ability to pay the proffered wage beginning at the priority date. He also observed that the petitioner's gross receipts or sales had decreased from 2001 to 2003.

On appeal, counsel resubmits copies of the beneficiary's W-2s provided to the underlying record. Counsel asserts that the director used the wrong formula to calculate the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003. Counsel also contends that the petitioner's business is financially viable as shown by the beneficiary's salary increases over the years, the petitioner's ability to meet its payroll and the total assets figures shown on item "D" at the top of page 1 of the relevant tax return, which exceed the proffered wage and, which, counsel contends, refutes the director's observation relating to the decrease in the petitioner's gross sales. Finally, counsel notes that the fact that the DOL approved the labor certification supports the petitioner's ability to pay the proffered wage.

These assertions are not persuasive. It is noted that CIS jurisdiction includes a determination of whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the shortfalls resulting from the comparison of the actual wages paid the beneficiary and the proposed wage offer of \$33,280 are as follows:

	Shortfall
2001	\$20,908.44
2002	\$20,399.68
2003	\$17,651.87
2004	\$12,408

As noted above, the petitioner's 2001 taxable income of \$126 before the NOL deduction could not cover the \$20,908.44 shortfall in that year. In 2002, the \$1,647 reported as taxable income before the NOL deduction could not meet the \$20,399.68 shortfall needed to be able to demonstrate the petitioner's ability to pay the full proffered salary in that year. Similarly, the \$8,493 declared as taxable income before the NOL deduction could not cover the 2003 shortfall of \$17,651.87. While the director used a different approach, the conclusion that available funds

including crediting the payment of wages to the beneficiary was not sufficient to demonstrate the petitioner's ability to pay in these years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. It may be observed that merely looking at other isolated factors like gross sales or wages paid may sometimes be misleading as a petitioner's net profit may increase due to more efficient management. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)).

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 depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further 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 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. As noted by the director, because the complete copies of the federal tax returns were not submitted with the pertinent attachments a review of the petitioner's net current assets may not be made. Counsel's reference on appeal to the petitioner's total assets shown on item D of page 1 is misplaced. This figure refers to the total assets shown on the Schedule L balance sheet that was omitted from consideration in this matter. A 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. Rather, as explained above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage because they represent cash or cash equivalent readily available resources.

Counsel cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA) for the proposition that the overall circumstances of a sole proprietorship should be considered. 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, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover the analysis applied to a sole proprietorship, which is an entity that indistinguishable from the assets and liabilities of its individual owner, is not directly applicable to the instant petition, which deals with a corporation.

In this case, as noted above, the petitioner's net taxable income could not cover the difference between the actual wages paid to the beneficiary and the proffered salary in 2001, 2002, and 2003. Similarly, the difference between the beneficiary's 2004 wages of \$20,872 and the proffered salary was \$12,408. The evidence does not indicate that the petitioner could pay this difference in 2004. While the petitioner has maintained a steady business, the issue is whether it has demonstrated its ability to pay the certified wage as set forth in the approved labor certification and as required by 8 C.F.R. § 204.5(g)(2), as of the priority date of April 30, 2001. In this case, the petitioner failed to establish its continuing ability to pay the proposed wage offer in any of the relevant years.

In some cases, pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the petitioner's ability to pay the certified wage may be based on the expectations of increasing business. *Matter of Sonogawa* may be applicable where the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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. In this case, the petitioner has provided three partial federal tax returns, showing modest net taxable income(s) of \$126, \$1647, and \$8,493, respectively, which were all substantially less than the amounts needed to cover the difference between the beneficiary's actual wages and the certified wage offer set forth in the ETA 750. It cannot be concluded that this represents a framework of profitability similar to that discussed in *Sonogawa* and that the petitioner has demonstrated that such unique business circumstances exist in this case, which parallel the facts set forth in that case.

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.