



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 06 069 50725

Office: TEXAS SERVICE CENTER

Date:

JUL 26 2007

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 Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel management firm. It seeks to employ the beneficiary permanently in the United States as a business promotions manager. 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 29, 2003. The proffered wage as stated on the Form ETA 750 is \$67,267 per year.

The Form I-140 petition in this matter was submitted on December 29, 2005. On the petition, the petitioner stated that it was established during 1993 and that it employs four workers. The petition states that the petitioner's gross annual income is \$380,000. The petitioner left blank the space provided for it to report its net annual income. On the Form ETA 750, Part B, signed by the beneficiary on August 26, 2003, the

beneficiary claimed to have worked for the petitioner since April 2003. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in San Antonio, Texas.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) copies of the petitioner's 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) copies of Form 941 quarterly returns for all four quarters of 2002, 2003, and 2004, (3) copies of statements pertinent to the petitioner's bank accounts, (4) two mortgage statements, (5) an undated letter from an accountant, [REDACTED] (6) a March 18, 2006 letter from another accountant, [REDACTED] and (7) an undated letter from the petitioner. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on August 1, 2000, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2002 the petitioner declared Schedule K, Line 23, Income of \$3,583. At the end of that year its current liabilities exceeded its current assets. The petitioner paid total Line 8 Salaries and Wages of \$30,650 during that year.

During 2003 the petitioner declared a loss of \$27,821 as its Schedule K, Line 23 Income. At the end of that year its current liabilities exceeded its current assets. The petitioner paid wages and salaries of \$44,000 during that year.

During 2004 the petitioner declared a loss of \$5,511 as its Schedule K, Line 17e Income. At the end of that year its current liabilities exceeded its current assets. The petitioner paid wages and salaries of \$25,000 during that year.

The quarterly returns show total wages the petitioner paid in the four quarters of 2002, 2003, and 2004. The total wages the petitioner paid varied from \$2,500 to \$12,500 during those quarters.

The mortgage statements provided are dated December 15, 2002 and November 12, 2003. They show that the petitioner is making payments on a mortgage loan of almost \$1 million. The monthly payments shown on those mortgage statements are \$6,636 and \$6,500, respectively. The interest rates are 6.25% and 6%, respectively. This office notes that, at those rates of payment and interest, if held constant, would amortize the petitioner's mortgage loan in approximately 23 years.

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

The undated letter from accountant [REDACTED] states that, based on the petitioner's financial statements and tax return the petitioner generated cash profit of \$42,948 during 2004, and that its profit before depreciation and payroll expenses was \$67,948. The record contains no financial statements.

The March 18, 2006 letter from accountant [REDACTED] states that the accountant reviewed a tax return² provided by the petitioner. The accountant purports to calculate the petitioner's "Income as Per Cash Basis" by adding its depreciation and amortization deductions to its "Income on accrual Basis," which is its ordinary income.

The petitioner's undated letter states that it generated a profit before depreciation during 2003, 2004, and 2005. The petitioner further stated that "depreciation, being a non-cash expense adds to the cash profit of the company." Further still, the petitioner stated that in future years the petitioner would pay down its debt and therefore have less interest expense.

The director denied the petition on January 27, 2006.

On appeal, counsel cited the petitioner's gross receipts, gross profit, salary and wage expense, total assets, and depreciation deduction as indices of its ability to pay additional wages. Counsel also stated, but did not document, that the petitioner has a \$1 million line of credit.³ Finally, counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a petitioner may demonstrate the ability to pay the proffered wage through the totality of circumstances notwithstanding that it suffered a loss or had low profits during a given year.

The assertion of the accountant that one can convert an accrual basis return to cash basis by adding back depreciation and amortization deductions is specious. Any number of additions **and subtractions** might be necessary to convert from accrual to cash.

Depreciation and amortization deductions are the systematic allocation of the cost of long-term assets, tangible and intangible, respectively. A depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or a sinking fund necessary to replace buildings and equipment at the end of their useful life. But the cost or other basis of assets and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

A depreciation deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each

² Although the accountant failed to specify which year's return he examined, he stated that the "Income on accrual Basis" was a loss of \$27,855. As that was the loss the petitioner declared as its ordinary income during 2003, the accountant apparently reviewed the 2003 return.

³ Counsel referred to Exhibit 4 as evidence of the petitioner's credit line. Exhibit 4 is the petitioner's 2004 tax return. None of the petitioner's exhibits pertains to a credit line.

given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient to its present purpose.

Further, amounts spent on long-term tangible and intangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation and amortization schedules, he does not offer any alternative allocation of those costs.⁴ Counsel appears to be asserting that the real cost of long-term assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

Counsel's reliance on the petitioner's gross receipts, gross profit, and total wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Gross profits are a company's gross receipts minus returns, allowances and the cost of goods sold, but before subtracting operating expenses such as rent, insurance, mortgage expense, repairs, maintenance, supplies, and utilities. This office sees no justification for considering the petitioner's income after the subtraction of some expenses, but not all, as a fund available to pay additional wages.

Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁵ or otherwise increased its net income,⁶ 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.

⁴ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

⁵ 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.

⁶ 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.

Counsel may have intended to assert that the petitioner's total wage expense was available to pay the wages of the proffered position. To demonstrate that those wages, or any part of them, were available to pay the wages of the proffered position the petitioner would be obliged, first, to show that they were paid for the performance of the duties of the proffered position. If they were paid to desk clerks and managers, the petitioner could not feasibly have dismissed those workers or declined to pay them in favor of paying the wages of the proffered position, business promotions manager.

Second, in order to show that those wages could have been used to pay the proffered wage, the petitioner would have been obliged to show that, had the beneficiary been available, they would have been able to discharge, and would have discharged, the employee or employees to whom those wages were paid, and then paid those wages to the beneficiary.

The purpose of the instant visa category is to provide workers for positions for which U.S. workers are unavailable. If the petitioner is replacing a U.S. worker with the beneficiary, the petitioner is obliged to demonstrate the reason the incumbent employee is leaving the position. The petitioner would be obliged to demonstrate that it is not replacing a U.S. worker with a foreign worker out of preference.

Finally, this office notes that, in any event, the total wages the petitioner paid to all of its employees during each of the salient years were considerably less than the annual amount of the proffered wage.

The petitioner stated, in its undated letter, that it would pay down its debts and therefore have less income expense and greater profits in the future. The petitioner's total assets ranged from \$1,195,457 in 2002 and 2003 to \$1,145,927 in 2004. The petitioner has a mortgage balance of nearly \$1 million, which clearly results in the bulk of its interest expense. As was noted above, at the current rate of amortization, the petitioner will require more than two decades to pay off that loan. The record does not support the proposition that the petitioner's debt service will soon diminish.

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.⁷ 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.

⁷ 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.

Even if the petitioner's line of credit had been evidenced, rather than merely alleged, a line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel's citation of *Matter of Sonogawa, Id.*, is unconvincing. *Sonogawa* does indicate that, in some cases, the totality of circumstances may demonstrate a petitioner's ability to pay the proffered wage during a given year even though it had losses or low profits during that year.

Sonogawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also suffered large moving costs and a period of time during which it 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 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 *Sonogawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel 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 those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the record contains no evidence, other than the unsupported assertion of the accountant, that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2002, 2003, and 2004 were uncharacteristically unprofitable years for the petitioner. This office finds no evidence that suggests that the petitioner's financial position will improve. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. 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, Citizenship and Immigration Services (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 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, although the beneficiary claims to have worked for the petitioner since April 2003, the petitioner did not establish that it paid any wages⁸ to the beneficiary during the salient years.

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 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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. 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.

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 that 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 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 minus 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 typically⁹ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than

⁸ Evidence that would typically be submitted to demonstrate wages paid during a given year would include Form W-2 Wage and Tax Statements, Form 1099 Miscellaneous Income statements, check stubs, and cancelled paychecks.

⁹ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

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 \$67,267 per year. The priority date is August 29, 2003.

During 2002 the petitioner declared Schedule K, Line 23, Income of \$3,583. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds available to it during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on December 29, 2005. On that date the petitioner's 2005 tax return was unavailable. Evidence pertinent to 2005 was never subsequently requested. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 2003, and 2004. 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.