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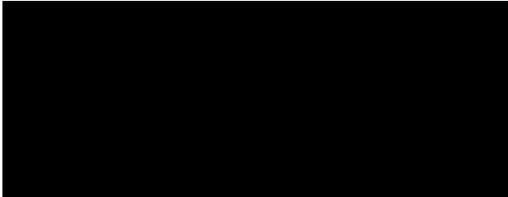
U.S. Department of Homeland Security
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U.S. Citizenship
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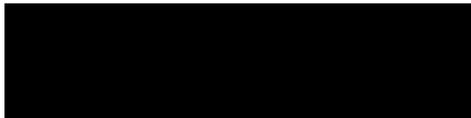


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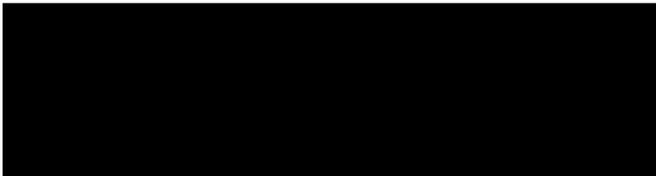
Date: MAR 30 2007

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, 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 an electrical contractor. It seeks to employ the beneficiary permanently in the United States as an electrician. 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.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.87 per hour, which equals \$26,769.60 per year.

The petition states that the petitioner was established on October 1, 1991, that its gross annual income is \$200,000 and that its net annual income is \$70,000. On the Form ETA 750, Part B, signed by the beneficiary on April 28, 2001, the beneficiary did not claim to have worked for the petitioner. The Form I-140 petition indicates that the petitioner would employ the beneficiary in Fayetteville, West Virginia. The Form ETA 750 indicates that the petitioner would employ the beneficiary in Harrisonburg and Charlottesville, Virginia.

The AAO reviews *de novo* issues raised in decisions challenged 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 a request for evidence dated January 24, 2005 the Vermont Service Center requested that the petitioner provide complete 2001, 2002, 2003, and 2004 Federal tax returns with all schedules and attachments. The request for evidence specified that, if the petitioner were held as a sole proprietorship, the petitioner must submit its owner's individual tax return including the Schedule C related to the business.

In the instant case the record contains the 2001 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse, and a portion of the petitioner's owner's and owner's spouse's 2002 and 2003 Form 1040 U.S. Individual Income Tax Return. The record does not contain complete 2002 and 2003 returns as requested by the service center. Further, 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.²

The schedules C submitted show that the petitioner's owner holds the petitioner as a sole proprietorship. The 2001 tax return shows that the petitioner's owner and owner's spouse had two dependents during that year. The number of dependents they had during the other salient years is unknown to this office.

The 2001 tax return shows that the petitioner returned a profit of \$37,672 during that year. The petitioner's owner and owner's spouse declared adjusted gross income of \$70,770 during that year, including the petitioner's profit.

The portions of the 2002 and 2003 tax returns provided show that the petitioner declared a loss of \$7,713 and a profit of \$18,148 during those years, respectively. Because the first pages of those returns were not provided, the petitioner's owner's adjusted gross income during those years cannot be determined.

In his decision on the visa petition the director noted that the petitioner had filed another petition for another alien worker, EAC 04 245 51110, which had recently been approved. The director also noted that the petitioner's owner and owner's spouse have two dependents. The director found that the evidence did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and denied the petition on August 3, 2005.

On appeal, counsel asserted that analysis of the petitioner's owner's personal finances is beyond the scope of the inquiry into the approvability of the instant petition and beyond the expertise of CIS. Counsel asserted

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).

² The record does contain photocopies of the beneficiary's tax returns, including Form W-2 Wage and Tax Statements issued to the beneficiary by companies other than the instant petitioner. The record also contains photocopies of monthly statements pertinent to the beneficiary's bank balances. Those documents are irrelevant to the petitioner's ability to pay additional wages.

that whether the petitioner filed another alien worker petition is also beyond the scope of the inquiry into the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel offered no evidence or authority in support of those assertions.

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, the petitioner did not establish that it employed and paid the beneficiary.

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 owner'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 owner's income tax returns, rather than the petitioner's owner's gross income. 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's owner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-

related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

The priority date is April 30, 2001. The proffered wage in the instant case is \$26,769.60 per year.

The record pertinent to the other alien worker petition filed by the instant petitioner and recently approved is not readily available to this office. If the petitioner employs this additional employee pursuant to the terms of the approved labor petition, however, it will incur the expense of another full-time worker.

Counsel argued that this additional expense is irrelevant to the determination of the petitioner's continuing ability to pay the proffered wage in the instant case, but did not explain his reasoning. This office notes that any predictable additional expense is pertinent to whether the petitioner will be able to pay the proffered wage in the future. If the wage offered in the second case is similar to that offered in the instant case³, the petitioner is obliged to show the ability to pay an aggregate wage of \$53,539.20⁴ per year during each of the salient years.

During 2001 the petitioner declared adjusted gross income of \$70,700. If the petitioner's owner had been obliged to pay the proffered wage out of his own funds, including the petitioner's net profit, during that year he would have been left with \$17,160.80 with which to support his family of four. No evidence was requested pertinent to the petitioner's owner's monthly expenses and none is in the record. This office believes that to expect that the petitioner's owner could support a family of four for a year on that amount, however, is unreasonable. The petitioner did not demonstrate the existence of any other funds with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the aggregate proffered wage during 2001 while allowing the petitioner's owner to support his family.

The petitioner did not provide the petitioner's owner's complete 2002 tax return as requested. As a result this office is unable to determine whether the petitioner's owner's adjusted gross income during that year was such that he could have paid the aggregate proffered wage while supporting his family. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.⁵

³ If this wage is incorrect and prejudices the petitioner's case the matter may be redressed on motion.

⁴ \$26,769.60 x 2.

⁵ Further, if, as counsel argued, the petitioner's owner's personal finances were beyond the scope of our inquiry, then the only salient figure before this office would have been the petitioner's net income, which was a loss of \$7,713. That loss does not show the ability to pay any portion of the proffered wage. Even if counsel's argument were not contrary to the ruling in *Ubeda v. Palmer, supra*, the petitioner would still have failed to demonstrate its ability to pay the proffered wage during 2002.

The petitioner did not provide the petitioner's owner's complete 2003 tax return as requested. As a result this office is unable to determine whether the petitioner's owner's adjusted gross income during that year was such that he could have paid the aggregate proffered wage while supporting his family. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.⁶

On January 24, 2005 the service center requested the petitioner's owner's complete 2004 tax return including the schedule C related to the petitioning business. On that date the petitioner's 2004 tax return was not due and may not have been available. The petitioner is excused from demonstrating its ability to pay the proffered wage during 2004 and later years.

The 2001 tax return was insufficient to show that the petitioner was able to pay the aggregate proffered wage during that year. The portions of 2002 and 2003 tax returns submitted were insufficient to demonstrate that the petitioner was able to pay the proffered wage during those years.

Counsel made an argument pertinent to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel appears to assert that to deny the instant petition would be contrary to the holding of *Sonegawa*, but does not specify in what way or offer any further argument or authority pertinent to the application of *Sonegawa* to the instant case.⁷

Counsel was apparently attempting to show that the petitioner is capable of paying the proffered wage notwithstanding that the petitioner's tax returns do not support that proposition. Counsel may have intended to assert that *Sonegawa* found that a petition need not necessarily be denied merely because a petitioner's net profit during a given year was less than the proffered wage. That assertion would have been correct. *Sonegawa*, 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 suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, 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

⁶ Again, even if this office accepted the argument that the only relevant part of the petitioner's owner's tax return is the schedule C related to the petitioner, the 2003 schedule C shows that the petitioner produced a net income of only \$1,848. That amount is insufficient to pay the proffered wage. Even if counsel had prevailed in his argument on appeal the tax returns submitted would not have demonstrated that the petitioner was able to pay the proffered wage during 2003.

⁷ Counsel stated, in a letter dated September 1, 2005, and submitted with the appeal,

"We believe the arbitrary nature of this decision merits a second look by your office, as your decision here would thumb the agency's nose at *Matter of Sonegawa*."

and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

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 that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2002 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.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002 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 petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial. As was noted above, the January 24, 2005 request for evidence requested that the petitioner submit its complete 2001, 2002, 2003, and 2004 tax returns. That request made clear that if the petitioner was a sole proprietorship the petitioner should provide copies of the petitioner's owner's tax return including the schedule C pertaining to the petitioner. The 2001 return is in the record. The failure to provide the 2004 return was excused, as is explained above. The petitioner did not provide its owner's complete 2002 and 2003 return, but only partial returns.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition might have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Having failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date the petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.