

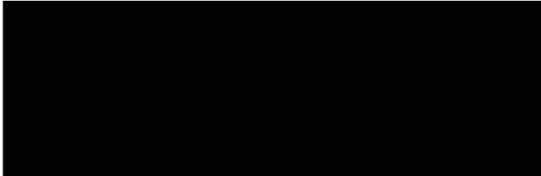
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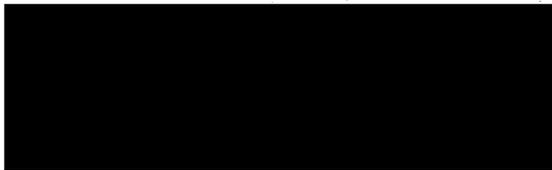
Date:

MAY 01 2007

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

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general contractor. It seeks to employ the beneficiary permanently in the United States as a decorative painter. As required by statute, an ETA Form 9089, Application for Permanent 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 asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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 other 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 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 ETA Form 9089 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on December 27, 2005. The proffered wage as stated on Part G of the ETA Form 9089 is \$29,557 per year. Part(s) J and K, signed by the alien beneficiary on February 27, 2006, do not indicate that he has worked for the petitioner.

The beneficiary lists two prior jobs on Part K of the ETA Form 9089. The first employer is "██████████" located in Western Springs, IL. The beneficiary states that he was employed from July 1, 2004 until December 28, 2005 as a decorative painter. Based on the business name and address, the beneficiary's name and address, and the addendum to this entry indicating that he was a "supervisor," it appears that the beneficiary was self-employed during this time period.

On Part 5 of the visa petition, filed on March 30, 2006, it is claimed that the petitioner was established in 1985 and does not currently have any employees.

As evidence of its continuing financial ability to pay the certified wage of \$29,557 per year, the petitioner submitted a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2005. The return indicates that the petitioner uses a standard calendar year to file its taxes. On this return, the petitioner reported taxable income of \$885 before taking the net operating loss (NOL) deduction. Schedule L of the tax return shows

that the petitioner had \$342 in cash reflected as current assets and no current liabilities, resulting in \$342 in net current assets. As an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The director denied the petition on May 11, 2006. He determined that neither the petitioner's net income or net current assets as shown on its tax return demonstrated its continuing ability to pay the proffered wage of \$29,557.

On appeal, counsel submits copies of the petitioner's 2005 and January through May 2006, checking account bank statements, as well as a copy of what appears to be a hand-written list of figures and names that are stated to represent payments from the petitioner to ██████████ in 2004 and 2005, according to a note signed by the petitioner's sole shareholder, ██████████. Accompanying these documents are nine pages of copies of the front of 133 checks. The copies have been reduced in size and almost all are illegible. Some checks are circled. On all of the checks, the payor appears to be the petitioner but the payee names are illegible except for four. One of the four is ██████████ written for \$5,000. It is one of seven checks in which the amount is legible, but the date is not.

Counsel asserts that the petitioner's financial position is shown through its bank statements' monthly ending balances. Counsel also relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that petitioner's reasonable expectations of future profit support the petition's approval based on the beneficiary's worth as a highly skilled painter. She further maintains that the petitioner has paid the beneficiary compensation of \$32,600 in 2004 and \$28,710 in 2005, which are reflected in the petitioner's labor costs.

Based on the evidence submitted to the record, counsel's assertions are not persuasive. 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 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. In this case, the record does not establish that the petitioner employed and paid the beneficiary at the level claimed by counsel. The handwritten note appearing on the copy of figures alleged to have been paid to the beneficiary is not sufficiently corroborated by the record. The names appearing on the list of figures do not include the beneficiary's name and are not identified. The copies of checks submitted to the record are all illegible, except as noted above and do not establish that such compensation was paid directly to 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 that 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. Reliance on federal income

¹ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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). 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.

In this case, the petitioner's 2005 tax return reflects a modest taxable income of \$885 and net current assets of \$342.

Counsel's reliance on the petitioner's bank statements is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise would provide an inaccurate financial portrait of the petitioner. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the period covered by the tax return, somehow show additional available funds that would not be reflected on the corresponding tax return. It remains that the regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports or audited financial statements if it considers its tax returns a poor reflection of its financial position. No audited financial statement was provided to the record.

Counsel also maintains that the petitioner is planning to increase its profits and that the beneficiary's employment will increase its business. The evidence doesn't convincingly show how the continued employment of the beneficiary as a decorative painter will significantly enhance the petitioner's business as a general contractor. It is further noted that the record does not demonstrate that the beneficiary's services provided in 2004 significantly impacted the petitioner's revenue. Counsel's hypothesis in this regard cannot be concluded to outweigh the evidence presented and does not constitute evidence of the petitioner's continuing ability to pay the proffered wage. See *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel asserts that the petitioner's ability to pay the certified wage may be based on the expectations of increasing business. Counsel is correct that *Matter of Sonogawa* is sometimes 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 presented one tax return showing a modest profit in 2005. It cannot be concluded that this represents a framework of success such as that discussed in *Sonegawa*, or that the petitioner has demonstrated that such unusual circumstances exist in this case, which are analogous to the facts set forth in that case.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the evidence and argument presented on appeal, the AAO concurs with the director's determination that the petitioner had not sufficiently demonstrated its continuing ability to pay the proffered wage beginning at the visa priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.