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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC 02 225 51604 Office: VERMONT SERVICE CENTER Date: DEC 30 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
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 a daycare center. It seeks to employ the beneficiary permanently in the United States as a cook. 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, the petitioner, through counsel,[1] maintains that the evidence supports the petitioner's financial ability to pay the proffered wage and requests a reversal of the director's decision.

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, 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 10, 2001. The proffered wage as stated on the Form ETA 750 is $11.87 per hour, which amounts to $24,689.60 per annum. On the Form ETA 750B, signed by the beneficiary on March 30, 2001, the beneficiary did not claim to have worked for the petitioner.

On Part 5 of the preference petition, the petitioner claims to have been established in 1999, to have a gross annual income of $422,154, and to currently employ twenty workers.

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[1] Although the notice of appeal suggests that counsel is affiliated with the law firm that previously submitted a Form G-28, Notice of Entry of Appearance as Attorney or Representative, counsel's name is not listed on this G-28. Counsel is reminded that a G-28 must either be submitted separately for each attorney or representative representing a petitioner or his name must be listed among those authorized to represent a petitioner on the G-28.

In support of the petitioner's ability to pay the proffered wage of $24,689.60, the petitioner submitted copies of its payroll register from December 19, 2001. It reflects that during this period, the petitioner employed seventeen full and part-time workers. The alien beneficiary's name is not listed on this payroll record.

The petitioner also initially provided incomplete copies of its Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001. These tax returns indicate that the petitioner files its returns using a standard calendar year. The tax returns reflect that in 2000, the petitioner declared -$259 in taxable income before taking the net operating loss (NOL) deduction, and in 2001 the petitioner reported -$14,314 in taxable income before the NOL deduction.

On February 25, 2003, the director requested additional evidence pertinent to the petitioner's ability to pay the beneficiary's wage offer beginning on the priority date of April 10, 2001 and continuing to the present. The director also requested a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001 if the petitioner had employed the beneficiary.

In response, the petitioner resubmitted another partial copy of its 2001 federal corporate tax return and a more complete copy of its 2002 federal corporate tax return. The 2002 tax return reflects that the petitioner reported $23,890 in taxable income before the NOL deduction. Schedule L of the tax return shows that the petitioner had $6,734 in current assets, $2,229 in current liabilities, resulting in $4,505 in net current assets. Net current assets are a measure of a petitioner's liquidity during a given period and represent the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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.

In addition, counsel submitted copies of unaudited financial statements for the period ending December 31, 2002, as well as a letter, dated April 21, 2003, from the accounting firm of [redacted] The letter disagrees with the director's findings regarding negative current assets and liabilities. It is noted that the director made no finding relating to the petitioner's negative current assets and liabilities either prior to, or subsequently in his final denial. In vouching for the petitioner's ability to pay the certified salary, the letter further describes the petitioner's history of ownership and notes depreciation deductions taken on the tax returns under review. Counsel also offers a copy of a 2002 W-2 for one of the petitioner's employees. Counsel states that the beneficiary is supposed take over the position held by this former employee. No further information is provided. The W-2 reflects that this employee was paid approximately $2,500 less than the certified wage

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 18, 2003, denied the petition.

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[2] 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.

On appeal, counsel submits copies of the petitioner's bank statements from Bank of America covering a period from January 31, 2001 to January 8, 2002. Counsel also resubmits copies of the documents provided in the underlying record as mentioned above, but submits a copy of the petitioner's 2001 corporate tax return that now includes a copy of the petitioner's Schedule L balance sheet. It shows that the petitioner had $3,414 in current assets and $27,011 in current liabilities, yielding -$23,597 in net current assets.

Counsel contends that the petitioner's financial status should be considered within the context of *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel argues that the petitioner's most recent (2002) tax return demonstrates the petitioner's ability to pay the proffered wage as reflected by the increase in gross sales or receipts and taxable income. Counsel argues that this shows that the petitioner has a present ability to pay the certified salary and has a reasonable expectation of future profits.

Counsel is correct that *Matter of Sonegawa* 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 *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The evidence contained in the record, including copies of the 2000, 2001, and 2002 tax returns, do not establish that such unusual circumstances exist in this case, which parallel those in *Sonegawa,* or that petitioner's net income reflected in the year of filing is somehow an uncharacteristic level of income within a framework of profitable years for a business that was established only 2 years before it filed for a labor certification for an alien worker. The petitioner declared a loss of $259 in 2000 and an increasing loss of $14,314 in 2001 before the net income showed an increase to $23,890 in 2002. The AAO cannot conclude that the petitioner's projection of future earnings and profitability overcomes the AAO's decision to affirm the director's denial. *See Matter of Great Wall,* 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

Counsel also states the beneficiary is employed by the petitioner and "is on track to earn the proffered wage for the year."

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any of the relevant years. Counsel's statement on appeal that

the beneficiary "is the current incumbent" of the certified position at an unstated salary, who may ultimately earn the proffered wage, is too vague to be included in the review of the petitioner's ability to pay the certified salary, has not been documented by any supporting evidence, and does not demonstrate the petitioner's ability to pay the full proffered salary as of the priority date of the preference petition, which was established when the labor certification was first accepted for processing by the DOL. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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. 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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 the Service should have considered income before expenses were paid rather than net income.

In this case, neither the petitioner's net income of -$23,597 in 2001, nor its net current assets of -$14,314 was sufficient to cover the proffered wage of $24,689.60. Although the petitioner's 2002 tax return showed some improvement in the petitioner's figures, it failed to demonstrate that either the petitioner's net income of $23,890 or the petitioner's net current assets of $4,505 could meet the certified wage during that year also. As noted above, 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay the proffered wage beginning on the priority date.

It is noted that the bank statements submitted on appeal 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 inaccurately describes the petitioner's financial picture. Bank statements reflect a portion of a petitioner's financial status during a given period and do not show other liabilities or encumbrances that may affect a petitioner's ability to pay the proposed wage offer. Moreover, no evidence was submitted to demonstrate that the funds reported on the petitioner's 2001-02 bank statements somehow reflect additional available funds that were not reflected on its 2001 or 2002 tax return, such as the cash specified on Schedule L that has already been included in the consideration of the petitioner's net current assets.

Similarly, there is no evidence that the unaudited financial statements, presenting the petitioner's financial data as of December 31, 2002, somehow reflect additional resources that were not reported on the petitioner's 2002 tax return. Unaudited financial statements cannot be accepted in lieu of one of the forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2), which, by its own terms, requires financial statements offered in support the ability to pay the proffered wage to be audited.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001or subsequently during 2002. 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 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.