identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 23 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile repair shop. It seeks to employ the beneficiary permanently in the United States as a mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 a brief and additional evidence.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is $700.00 per week, which amounts to $36,400 annually.

With the petition, the petitioner submitted no evidence of the petitioner's ability to pay the proffered wage.[1]

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 7, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2001 federal tax returns or evidence of wages paid to the beneficiary to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

---

[1] Counsel for the petitioner indicates that the petitioner's 2001 corporate tax return was submitted with the initial filing of the visa petition; however, the record of proceeding does not contain it and the director's request for evidence indicates it was not submitted as well.

In response, the petitioner submitted Form 1065 U.S. Return of Partnership Income tax return for the year 2001. The tax return reflects the following information:

	2001
Gross receipts or sales	$415,092
Ordinary income	-$24,017
Salaries and wages	$11,750
Cost of labor	$241,350
Current Assets	$0
Current Liabilities	$0
Net current assets	$0

In addition, counsel submitted copies of the beneficiary's Form 1099, Miscellaneous Income, issued by the petitioner to the beneficiary in 2002. The Form 1099 reflects wages paid to the beneficiary of $30,000, $6,400 less than the proffered wage. Counsel stated that the beneficiary's Form 1099 in the year 2001 was unavailable.

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 May 28, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's reported loss does not reflect an inability to pay the wages because of its gross receipts and expenses paid to cover salaries and costs of labor. Additionally, counsel cites the facts and holding of the case, *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) as similar to the petitioner's situation. In addition to re-submitting evidence previously submitted, as well as the petitioner's owner's individual income tax return, the petitioner submits the petitioner's 2002 tax return, which reflects the following:

	2002
Gross receipts or sales	$627,606
Ordinary income	-$11,326
Salaries and wages	$0
Cost of labor	$224,931
Current Assets	$58,832
Current Liabilities	$43,675
Net current assets	$15,157

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 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 2001 or 2002. There is no evidence of any wages paid to the beneficiary for 2001 so the petitioner is obligated to show it can pay the entire wage or $36,400. In 2002, there is evidence of

$30,000 in wages paid to the beneficiary, so the petitioner is obligated to show it can pay the remainder of the proffered wage, which is $6,400.

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 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). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. 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 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, now CIS, should have considered income before expenses were paid rather than net income.

Nevertheless, counsel is correct that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The 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, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If a partnership'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. The petitioner's net current assets during, 2001, however, were $0. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause. The petitioner's net current assets illustrated on its 2002 tax return, a return unavailable when the director requested evidence and submitted on appeal, reflects sufficient net current assets with which to pay the remainder of the proffered wage in that year. In 2002, the petitioner's net current assets are $15,157, which is greater than the $6,400 the petitioner had to show it could pay during that year in order to illustrate an ability to pay the proffered wage for this instant petition. Thus, the petitioner illustrated an ability to pay the proffered wage in 2002 through its net current assets. The petitioner,

---

[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.

however, must address its financial situation in 2001 for the petition to succeed since the petitioner must demonstrate an ongoing ability to pay the proffered wage from the date of the priority date.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a loss of $24,017 and no net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.[3] The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

Counsel relies upon the holding in *Sonegawa*, 12 I&N Dec. 612, for the proposition that the petitioner can pay the wages regardless of its reported loss in 2001. *Sonegawa,* however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. 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 the 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

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

---

[3] The petitioner did not provide its partners' individual income tax returns for 2001. The partners of a limited liability partnership may be able to evidence ability to pay the proffered wage from partners' assets if they are unencumbered and greater than the proffered wage.