



U.S. Citizenship
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Services

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Office: NEBRASKA SERVICE CENTER

Date:
AUG 30 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

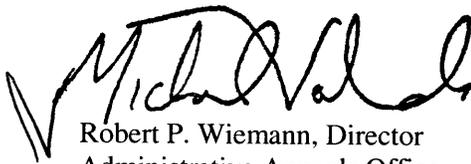
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director
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 sustained.

The petitioner is an interior and exterior painting company. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$19.28.00 per hour (\$40,102.40 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120S U.S. Corporation Income Tax Return for 2001 and 2002, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center on September 26, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

* * *

Form I-140 indicates that the beneficiary will be paid \$777.20 per week, or \$40,102.40 per year. The petitioner's 2001 corporate income tax return reflects income sufficient to pay the offered wage; however, the petitioner's 2002 income tax return shows income of \$31,745. This is less than the offered wage. Therefore, the evidence indicates that the petitioner had the ability to pay the offered wage at the time the priority date was established, but does not establish that such ability has been maintained.

The petitioner must submit additional evidence to establish that it has maintained the financial ability to pay the offered wage beyond 2001. Such evidence may include audited profit/loss statements complete bank account records, and/or personnel records.

If the petitioner employed the beneficiary during 2002, please submit a legible copy of the 2002 Form W-2 (Wage and Tax Statement) issued to the petitioner

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted a letter dated December 13, 2003, a support letter from petitioner, and a copy of a check dated October 17, 2003 payable to the beneficiary with a memo "9/29/03-10/10/03 80hr."

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$40,102.40 per year from the priority date.

- In 2002, the Form 1120S stated taxable income¹ of \$31,745.00.
- In 2001, the Form 1120S stated taxable income of \$47,567.00.

The director denied the petition on March 25, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts:

The petitioner has sufficient income to pay the offered wage as evidenced by information which the Service Center Director did not take into consideration. The attestations by the petitioning employer do establish the use of funds and revenues in a way which would enable the petitioner to pay the beneficiary the offered wage.

Counsel submitted the following copies or originals of documents on appeal: a support and explanation letter from petitioner dated April 20, 2004; another support letter from petitioner dated October 17, 2003; a 1099-MISC used to evidence payments to non-employees for beneficiary for tax year 2003 in the amount of

¹ IRS Form 1120S, Line 21.

\$9,480.00; a resubmitted 2001 and 2002 Form 1120S tax returns; and, a 2003 Form 1120S tax return for petitioner.

The 2003 tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$40,102.40 per year from the priority date.

- In 2003, the Form 1120S stated taxable income of \$74,323.00.

Therefore, in years 2001 and 2003, the petitioner had taxable income sufficient to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner engaged the beneficiary to work. (i.e. A copy of a check dated October 17, 2003 payable to the beneficiary with a memo "9/29/03-10/10/03 80hr." in the amount of \$1580.00 was submitted as well as a Form 1099-MISC evidencing non-employee compensation paid in the amount of \$9,480.00 in 2003.)

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now 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 v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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. No evidence was submitted that the petitioner paid the beneficiary wages in 2002.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to sufficient pay the proffered wage in tax year 2002 for which petitioner's tax return is offered for evidence.

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

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

corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's 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.

Examining the Form 1120S U.S. Income Tax Return submitted by petitioner, Schedule L found in that return indicates the following.

- In 2002, petitioner's Form 1120S return stated current assets of \$2037.00 and \$17,651.00 in current liabilities. Therefore, the petitioner had <\$15,614.00>³ in net current assets for 2002. Since the proffered wage was \$40,102.40 per year, this sum is less than the proffered wage.

Therefore, for the year 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage during 2002 through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date through the inclusion of "depreciation" taken as a deduction in the tax returns. Also, petitioner in letters submitted in the record of proceedings, asserts that the hiring of the beneficiary will replace outside contractors and reduce his business expenses even more than the additional expense of the proffered salary. Counsel cites no legal precedent for the positions and, according to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. In his calculations, counsel is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result.

Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Petitioner's counsel cited no legal precedent for his position. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

"Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that the court should revise these figures by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537."

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.

³The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁴ 8 C.F.R. § 204.5(g)(2).

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Petitioner, in letters submitted in the record of proceedings, asserts that the hiring of the beneficiary will replace outside contractors and reduce his business expenses even more than the additional expense of the proffered salary. Counsel points out that there is an expense item used as an deduction designated "Outside Services" included on Statement 1, Page 1 of petitioner's tax return for 2002 in the amount of \$651,376.00 that could be lessened by the hiring of the beneficiary as an employee. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a painter will significantly increase petitioner's profits. The record of proceedings now does not name the painting sub-contractors, state their compensation, verify their contractual employment, and, or provide evidence of the efficacy of the petitioner's intent to replace them with the beneficiary. The petitioner has not documented the position, duty, and contract price of the subcontractors who performed the duties of the proffered position that the beneficiary would replace. Therefore, sufficient evidence has not been presented to show the prospective savings that petitioner would earn by employing the beneficiary in the occupation of stone carver in lieu of the employment of sub-contractors. The petitioner has the burden to come forward with probative evidence sufficient to sustain its assertions.

Petitioner has demonstrated through the submission of tax returns, and, evidence of intent by hiring the beneficiary to increase profits by reducing expenses the viability of its business. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

There are parallels in the subject case to the precedent case *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). There was only one year, 2002, that the petitioner had taxable income by \$8357.40 insufficient to pay the proffered wage. The average tax average income of the business for years 2001 through 2003 was \$51,212.00 that is more than the proffered wage of \$40,102.40 per year. With gross receipts of \$998,591.00 in 2001 rising to \$1,052,038.00 has a successful and profitable business. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years, as is the case here. Counsel, by forthrightly submitting complete tax records, has established a case for application of *Matter of Sonogawa*. The petitioner is a viable business that has proved its ability to pay the proffered wage.

Unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. Tax year 2002 was an uncharacteristically unprofitable year for the petitioner.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

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 met that burden.

ORDER: The appeal is sustained.